JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 38/90

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

REGINA

VS.

JAMES SMITH

F.M.G. Phipps Q.C., Miss Millicent Rickman, Wentworth Charles, Jeremy Palmer, instructed by Howard Mitchell of Clinton Hart and Co. for Appellant.

Glen Andrade Q.C., Director of Public Prosecutions, Lloyd Hibbert, Deputy Director of Public Prosecutions, and Samuel Bulgin for Crown.

October 1-5, 8 and November 21, 1990

ROWE P.:

Jamaica has a surplus of male farm-workers. Agricultural sectors in U.S.A. and Canada have seasonal shortage of farm-workers. Long-standing arrangements exist between Jamaica and its two giant northern neighbours whereby Jamaican farm-workers fill these seasonal voids. As will appear more fully in this judgment, large sums of money are accumulated in these farm-workers' programmes from which in the period 1981-1988 huge sums were systematically withdrawn in fraudulent circumstances. The appellant, a former Cabinet Minister in Jamaica, with portfolio responsibility

for the Ministry of Labour, in the years 1980-1989 was convicted after a protracted trial, by His Honour Mr. Donald McIntosh, Resident Magistrate for Kingston on one count of conspiracy to defraud, on one count of receiving knowing that the property was obtained in circumstances amounting to a misdemeanour and on five counts of receiving property knowing it to have been obtained in circumstances amounting to felony. On his appeal to this Court against his convictions and sentences, we found no merit in the submissions which related to convictions, but reduced the sentences on the receiving counts to three years imprisonment, as in passing five year terms of imprisonment on each of those counts, the learned Resident Magistrate had exceeded his statutory jurisdiction on sentencing. We set out herein the reasons which impelled us to dismiss the appeals against conviction.

By agreement with the United States Sugar Corporation, a number of English speaking Caribbean territories, including Jamaica, arrange for their nationals to participate in seasonal agricultural work in the U.S.A. A tripartite agreement is concluded in respect of each worker which records the obligations of the employer, of the agent of the participating Government and of the farm-worker. To facilitate the smooth co-ordination of the farm-work programme in the U.S.A. (hereinafter "the U.S.A. programme") an Organization known as the West Indies Central Labour Organization (W.I.C.L.O.) was formed with its chief executive called the Chief Liaison Officer. The policy-making arm of W.I.C.L.O. was the Regional Labour Board on which Jamaica, by virtue of a Heads of Government resolution in 1962, held permanent chairmanship. Three of the other five members were from Jamaica and the remaining

two from the eastern Caribbean. Meetings of the Regional Labour Board are held in Jamaica in five consecutive years and in the sixth year in one of the other participating territories.

Under the tri-partite agreement the obligations of the employer included the duty to deduct a fixed percentage of each worker's gross wages to be used by the Chief Liaison Officer to effect insurance on behalf of the workers and for extra-ordinary emergency services also on behalf of the said workers. Further the employers were mandated to deduct some 23% of each Jamaican worker's gross wages for transmission to Jamaica through W.I.C.L.O. When those deductions reached Jamaica an amount equivalent to 2% of the gross wages of each worker was deducted as a cess and transmitted from Jamaica to W.I.C.L.O. to form the operating fund of that Organization. This indirect method of accounting was necessary to conform with the United States law which prohibited deductions from workers' wages for the purposes of administering the programme. In 1967 the employers in U.S.A. agreed to contribute 1% of each employee's gross wages to W.I.C.L.O. From this 1% employer contribution the National Insurance Scheme payments for Jamaican workers was made and balances were lodged to a special bank account in Washington.

Farm-workers in the U.S.A. programme as well as those in the Canadian programme were insured against accident and illness with an Insurance Company in New York through the agency of W.I.C.L.O. in Washington. Premiums were paid monthly and the insurance payments covered sick benefits, including daily benefits, medical, hospital and drugs charges At the end of each policy year, the Insurance Company refunded the difference between the total premiums received and their disbursements which included U.S. taxes, and their management

fees. This refund was called the Retroactive Rate Credit. That portion which related to the U.S.A. programme was retained in Washington while that for the Canadian programme was either sent to the Ministry of Labour in Jamaica or to the Chief Liaison Officer in Canada.

The Canadian Farm-work Programme was established in 1966 with a Memorandum of Understanding between the Government of Canada and the Government of Jamaica signed on the one hand by the Minister of Employment and Immigration and on the other hand by the Minister of Labour, Jamaica to which was annexed Operational Guidelines. These Guidelines required the Jamaican Government to make all the necessary arrangements for the recruitment of the farm-workers and for the appointment and maintenance of a Liaison Service in Canada. A third relevant document was the tri-partite agreement between the Canadian employer, the farm labourer and the Government of Jamaica through its duly elected agent. An important clause of this agreement was that the employer would deduct on each pay-day a fixed percentage of the gross wages of each worker and remit the same to the Government's agent. During the life of the Canadian programme the fixed deduction moved from 20% to 25%. The Government agent retained 5% of the gross wages of each worker as an Operational Cess, that is to say for the expenses of the Liaison Service, and forwarded the other 20% to Jamaica for the benefit of the worker.

At the Jamaican level the Canadian programme came under the executive control of a Management Committee. This Committee was established by Cabinet and its members were appointed by Cabinet on the recommendation of the Minister of Labour after consultation with interested parties, including the Trade Unions. Its Chairman was the Permanent

Secretary in the Ministry of labour and it functioned as the policy-making arm of the Canadian programme until 1981. Thereafter no further meetings of the Committee were held and its role was usurped by the Minister of Labour and the Permanent Secretary.

At its inception the accounts of the Canadian programmme were kept at the Jamaican High Commission in Ottawa and were under the control of the Minister of Foreign Affairs. In 1961 for reasons which will become apparent later, those accounts were transferred from the High Commission in Ottawa to the Liaison Service in Toronto. Thereafter these accounts were never audited until 1989.

W.I.C.L.O. maintained its own account at Riggs National Bank in Washington. Funds intended for the Government of Jamaica were lodged to the Government's account at the Bank of Nova Scotia, Washington while moneys intended for other participating territories were lodged to their several accounts. Between 1944 and 1948, the Auditor General of Jamaica audited W.I.C.L.O.'s accounts. Subsequent audits were done by Price Waterhouse.

Considerable credit balances were in the Washington accounts of W.I.C.L.C. and in the Canadian accounts of the Liaison Service. On the case presented by the Crown, the appellant from his lofty position as Minister of Labour corruptly induced his venal Permanent Secretary to join with him in a scheme to systematically mulct these accounts and succeeded in eight years to render the farm-workers' accounts the poorer by hundreds of thousands of dollars of hard currency. When the frauds were discovered Probyn Aitken (hereinafter Aitken) who held the Office of Permanent Secretary, Ministry of Labour from January 3, 1978 to October 20, 1987 determined to co-operate with the police and to tell all he knew. He was

charged with conspiring with the appellant and others to defraud the Government of Jamaica of funds held in the two farm-work programmes. He pleaded guilty, was sentenced to a term of nine months imprisonment and was an essential witness at the trial of the appellant against whom three sets of charges were preferred in the seven-count indictment.

It is convenient to indicate the charges brought against the appellant at this stage. Count 1 alleged that between June 1, 1981 and August 11, 1989 the appellant conspired with Aitken, Hector's River Farm Ltd and others to defraud the Government of Jamaica by fraudulently utilizing funds held by the Jamaica Liaison Service and the West Indies Central Labour Organization on behalf of the said Government of Jamaica for their own benefits or purposes. Count 2 alleged that the appellant received without lawful excuse the sum of U.S. $50,000.00 knowing that it had been obtained in such circumstances that if the act had been committed in Jamaica, the person comitting it would have been guilty of a misdemeanour. Counts 3 - 7 alleged the receipt by the appellant of various sums of money on stated dates knowing in each case that the money had been obtained in such circumstances that if the act had been done in Jamaica, the person committing it would have been guilty of a felony.

The appellant relied on his right of silence during the trial and apart from pleading not guilty, was mute throughout. Defence Counsel made a no-case submission at the end of the prosecution's case, intimating then, that he would not in any event be calling any evidence for the defence. He kept that promise. Important and for this jurisdiction novel points of law were argued for the defence at trial and again before us.

Before detailing the evidence in the case, which as we have said above, came only from the prosecution, we anticipate ourselves by referring to a finding of the learned Resident Magistrate on the credit-worthiness of Aitken when he said:

> "In observing his demeanour the court found that this was a man - a former Permanent Secretary, a learned man, now a self-confessed thief, trying vainly to hang unto whatever shreds of dignity he could muster as he stood alone day after day in the witness box.
>
> He stood bravely against those who feel that a thief should not give evidence against his partner in crime. He was a man alone, baring his soul, trying to atone for his own misdeed".

Earlier the trial Magistrate had said of Aitken:

> "True the witness Aitken made mistakes. There were errors of memory, rather than any deliberate attempt to mislead the court. He could not recall exact dates on which incidents took place over a period of some eight years starting in 1981. But the documents speak for themselves".

We will now summarize the evidence given by Aitken, which, having been accepted by the tribunal of fact as being true, we will treat as facts found in the case.

As Permanent Secretary, Ministry of Labour, Aitken was the designated Accounting Officer for that Ministry by the Minister of Finance under the provisions of Section 16 of the Financial Administration and Audit Act (F.A.A. Act). Instructions for the guidance of public officers to provide a sound basis for proper administration of public moneys were issued by the Minister in accordance with Section 17(1) of the Act on April 20, 1977. "Officer" is defined in the

F.A.A. Act to mean "any person in the employ of the Government", and "public moneys" is defined to include:

> "(a) revenue;
>
> (b) any trust or other moneys held, whether temporarily or otherwise, by an officer in his official capacity either alone or jointly with any other person whether an officer or not".

These definitions, are with slight modifications repeated in the 1977 Instructions to Accounting Officers in which too the term "Accounting Officer" is defined to be:

> "Accounting Officer is any person designated by the Minister pursuant to section 16 of the Act and charged with the duty of accounting for expenditure on any service in respect of which moneys have been appropriated under Law".

These instructions can neither extend nor restrict the meaning of Accounting Officer as defined in the F.A.A. Act.

The appellant, said Aitken, when he assumed portfolio responsibility for the Ministry of Labour took a keen interest in the farm-work programmes. After the appellent's visit to Canada in about May 1981, he objected very strongly to the Canadian funds being administered by the Jamaican High Commission in Ottawa under the auspices of the Ministry of Foreign Affairs and directed their transfer to Toronto away from the High Commission and into the Liaison Service within the purview of his Ministry. He objected to meetings of the Management Committee as he felt that the matters with which the Committee dealt could be more appropriately dealt with by himself. He discarded the policy decision as to the role of the Management Committee as he refused to be fettered by the decisions of the Cabinet of a former Government. At a 1981

meeting of the Management Committee decisions were taken to transfer the Canadian funds to Toronto and to appoint a Chief Liaison Officer in Canada. Ronan Critchlow, a Director of Manpower in the Labour Ministry was selected for the Chief Liaison Officer's position and he was despatched to Canada with written instructions from Aitken in his capacity as Permanent Secretary and Chairman of the Management Committee to effect transfer of the funds, to purchase two dwelling-houses, one for his official use and the other for use by visiting dignitaries and generally to establish the Liaison Service on this upgraded basis.

At approximately the same time as Critchlow was being prepared for Canada, the second prong of the attack was launched against the U.S.A. programme. The appellant told Aitken that he had need for the expenditure of an amount of U.S. $50,000.00 in and around the Ministry and that Aitken should request these funds from W.I.C.L.O. in Washington. Aitken telephoned Harold Edwards, the Chief Liaison Officer in Washington and told him of the appellant's request. Edwards asked for an authorization letter and Aitken, writing on the official note-paper of the Ministry of Labour and Employment on October 15, 1981 addressed the Chief Liaison Officer thus:

> "I am confirming our recent telephone conversation, in which I informed you that it has been decided to draw down an amount not exceeding Fifty Thousand Dollars (U.S. $50,000) from the amount of the Employers' contribution to the social welfare of the farm-workers for 1980. As you know, I shall be meeting with the Minister in Orlando on or about the 22nd October. It would be convenient to hand over the amount then.
>
> This means that, in addition to the amount which you were asked to lodge on account purchase of motor car, there would be a total draw down from

> "this account of Fifty Seven Thousand Thousand Five Hundred dollars (U.S. $57,500)".

This memorandum was signed:

> "P. W. Aitken
> Permanent Secretary and
> Chairman, Regional Labour Board".

Before the receipt of this letter, Edwards acted upon the telephone request of Aitken. He wrote to Aitken on October 21, 1981, forwarding the cheque requested. Aitken testified that he received the cheque through the post in Jamaica, while Edwards spoke of handing him the cheque in Orlando, U.S.A. Aitken's version is supportable by a letter of Edwards dated October 21, 1981 in which Edwards writing to Aitken as "Permanent Secretary, Ministry of Labour, Jamaica", said:

> "Please refer to your telephone request of October 14 and find herewith this Organization's cheque for $50,000 in your favour.
>
> This amount is a portion of the 1% contribution being held in this office before transmission to Jamaica on behalf of Jamaican workers.
>
> Please refer to my letter of September 25 and let me have confirmation in regard to your previous telephone request for payment of $7,500 from the same fund to the bank in Belgium".

Having received this cheque for U.S. $50,000.00 made payable to the Permanent Secretary, Ministry of Labour, Aitken apprised the appellant of the fact and that Aitken was about to lodge cheque to the Ministry's account. "Hold it", said the appellant, "because to send this cheque through the system would set off alarm bells". Aitken held the cheque.

Next the appellant told Aitken that he still wanted U.S. $50,000.00 in cash and that Aitken should proceed to Washington and get the money. Aitken again telephoned Edwards who agreed to receive Aitken in Washington. At the meeting

in Washington Aitken swore that he told Edwards his problem, that he was under pressure to get this much money in cash. Again Edwards requested written authority and Aitken obliged. He wrote:

> "I will be grateful if you will issue an amount of $55,000 U.S. from the 1% Cess in favour of the Social Welfare for Farm Workers.
>
> I would like this amount to be paid to me in three separate cheques as follows:
>
> $50,000.00
>
> 3,000.00
>
> 2,000.00
>
> $55,000.00
>
> These payments together with the two previous payments of $50,000 and $5,700 will bring the total withdrawn the account to $112,500.000".

He signed it:

> "P. W. Aitken
> Permanent Secretary and
> Chairman, Regional Labour Board".

It is to be observed that the figure of $5,700.00 was written in error for $7,500.00.

The cheques requested were undoubtedly issued in Aitken's name and were negotiated at Riggs National Bank the same day, with Aitken receiving $50,000.00 in cash and two drafts for the smaller cheques. The extra $5,000.00 was demanded and received upon Aitken's sole initiative. Aitken said he returned to Jamaica with the cash, went to the appellant's office, handed him the money with an introductory sentence such as: "This is what you asked me for. Here it is". The appellant accepted the proffered sum with the laconic response: "Thank you".

At the end of November 1981, Aitken and the appellant went to Canada together. Aitken took with him the cheque for U.S. $50,000.00 received earlier from Edwards of W.I.C.L.O. on the instructions of the appellant, for the purpose of encashment in Canada through one of the Toronto Liaison Service Accounts as this could be achieved, said the appellant, "without setting off alarm bells". In furtherance of this scheme Aitken gave the cheque in Toronto to Critchlow with instructions to obtain cash therefor as quickly as possible as the appellant's stay in Canada would be a short one. The Bank Manager refused to give cash for a Government cheque which in his view ought to be lodged to an account. Critchlow reported to the appellant and Aitken. Aitken demanded that Critchlow obey his earlier instructions. The appellant gave the weight of his authority to the directive by instructing Critchlow that if the Bank Manager refused to carry out the instructions which he had been given to change the cheque Critchlow should remove the Liaison Service accounts from that bank immediately and find another bank which would be more co-operative. Critchlow who demanded and received written instructions for this assignment, returned to the bank and obtained cashier's drafts for U.S. $40,000.00 and U.S. $10,000.00 in cash which he handed to Aitken who in turn gave it to the appellant at Miami Airport. When, however, Aitken told the appellant that he had received the cashier's drafts and the cash in exchange for the U.S. $50,000.00 cheque he responded:

> "What I told you, it would work, hold on to it".

On December 7, 1981 Aitken opened a current account in in his own name at Credit Suisse Bank in Miami. Aitken described how this came about. The appellant told him that he, the appellant, wanted easier access to the Canadian funds and that he could do better with the funds in U.S.A. than in Canada. Aitken advised that permission of the Ministry of Finance was necessary which advice the appellant rejected and suggested that a private account should be established instead. One of the Liaison Officers in U.S.A. refused to act on the suggestion from Aitken that he should open this private account, whereupon Aitken accepted the further suggestion from the appellant that he should open an account in his own name. The appellant provided five of the U.S. $1,000.00 cashier's drafts part of the $50,000.00 transaction in Canada for opening the account. Over the period covered in the conspiracy count, cheques for more than U.S. $500,000.00 were drawn on the Jamaica Liaison Service accounts in Canada in favour of Aitken and were forwarded to him in Jamaica, or handed to him in Canada or Miami. Aitken lodged these funds partly in a savings account, partly in a money market account and partly in a current account at Credit Suisse Bank in Miami. Into this current account he once lodged U.S. $400.00 the property of the appellant, approximately $28,000.00 received from W.I.C.L.O. as Retroactive Rate Credit, and money of his own amounting to about U.S. $25 - 30,000.00.

Aitken maintained throughout his evidence that the funds requested from the Canadian accounts were "hived off" at the suggestion of the appellant who was made aware that the Bank of Jamaica was particularly interested in Aitken's holdings overseas, and who suggested that false returns be supplied to the Bank of Jamaica in which the Miami accounts would not be disclosed. Moneys in the Miami accounts were to be maintained for emergencies, insisted the appellant.

Cheque for U.S. $7,500.00 dated 25th September 1981 and for U.S. $12,750.00 dated April 1, 1982 were requested by Aitken from Edwards of W.I.C.L.O. to be forwarded to a named bank in Belgium for the purchase of a motor car for a Minister of Government. These cheques were in fact sent. Aitken said that in issuing these instructions to Edwards he acted on the request of the appellant. Indeed he gave to the appellant a further sum of U.S. $6,000.00 drawn on the Miami accounts out of the Canadian funds, to complete the purchase. The appellant had explained to him that on his understanding of the proposed Cabinet motor-car policy, it would soon be impossible to import a Mercedes-Benz into Jamaica and that the appellant would reimburse the Ministry for the funds advanced from the farm-work programmes for the purchase of the Mercedes-Benz. The car arrived in Jamaica and the appellant pointed it out to him on the premises of the Ministry of Labour, saying: "This is the Benz".

Another motor vehicle, a 1982 Toyota Land Cruiser was purchased from Brimell Motors Limited by Heron of the Canadian Liaison Office, on the instructions of Aitken from the Canadian funds and was shipped to Jamaica to the appellant. Aitken explained that between 1981 - 1984 about twelve vehicles were imported for the Ministry of Labour out of surplus funds in the Canadian programme. These vehicles included a blue Land Cruiser which was cleared from the wharf by a Ministry official and painted to designate it as a Ministry vehicle. So furious did the appellant become that this had happened, when he had a personal interest in that vehicle, that he caused the official, a Mr. Chattan, to be transferred from the Ministry. This led Aitken to instruct Heron to purchase the Toyota Land Cruiser from Brimell.

A third motor vehicle was requested by the appellant. Aitken said he was instructed by the appellant to bring down from the Canadian Farm-Workers' Programme a Land Cruiser for his use as a farm vehicle, so that it would not attract customs duty. In this regard, Aitken spoke with Ruel Rhoden of Uni Motors, agents for Toyota in connection with the clearance of this vehicle, and with Ernest Wynter of the Customs Service. Aitken said too, that he gave instructions to Heron in Canada to make the purchase and discovered then that Heron knew all about the proposal. Aitken instructed Heron to pay the Canadian equivalent of 2,315,400.00 yen to Toyota's Bankers in Tokyo and these instructions were obeyed.

A Voice Protection System was purchased from Motorola Incorporated of Florida for U.S. $40,900.00 out of the funds in the Canadian Liaison Service account. It arrived in Jamaica, was cleared by agents of Ruel Samuels Ltd., and was installed at two locations in Manchester at the direction of the appellant whose initials were inscribed on portions of the equipment. An insignificant and never used part of this equipment was installed in a motor car used by a senior official of the Ministry of Labour. Aitken said that he required, for the purposes of the Ministry of Labour, equipment to monitor the movement of Ministry vehicles, a proposal endorsed by the appellant. He therefore ordered from Motorola equipment valued at U.S. $13,900.00 but received information from Canada that the bill presented to the Liaison Service in Toronto by Motorola amounted to U.S. $40,900.00. He then discussed the matter with the appellant who admitted that he had enlarged the order. Aitken gave instructions to Heron in Toronto to pay.

Aitken maintained an account for the Management Committee at the Bank of Nova Scotia, Scotia Centre, Kingston funded with cheques from the Retroactive Rate Credit which

ought properly to have been lodged to the account of the Ministry of Labour. From this account Aitken made payments in respect of funeral expenses of deceased farm-workers. The appellant told Aitken that he owned a company called Rapid Repairs and Maintenance Services and on three occasions the appellant requested payment on behalf of that company from the Management Comittee's Account. On the first occasion payment was made for work done on the Ministry's premises. On two other occasions Aitken was told to "get money ready for Rapid". No bill was presented by the appellant but cheques drawn on the Management Committee's account were prepared and delivered to the appellant at a time when no work therefor had been done by Rapid. Subsequently, said Aitken, work of a shabby nature was attempted at 1F East Street.

Aitken said that between 1981 and 1986 the appellant received approximately U.S. $131,000.00 out of W.I.C.L.O. funds and approximately U.S. $183,000.00 out of the funds of the Jamaican farm-work programme in Canada in cash and cheques. The established system for these payments was for the appellant to demand from Aitken stated sums in cash or cheques especially on the occasions when the appellant was travelling overseas. The appellant's standard instructions, often repeated, were that the appellant's name should not appear on any documents in connection with these payments. For years, Aitken said, he faithfully complied with these instructions but latterly, he made cheques payable to "J. Smith", "J. A. Smith", J. A. G. Smith", enclosed each in an envelope and handed the sealed envelope to the appellant at the very last moment before his departure from Jamaica so as to avoid the envelope being opened in his presence. Over the years money was paid to the appellant in Miami, Toronto, Geneva and Jamaica. Some of the payments in Jamaica form the basis of counts 3 - 7.

The blandishments and veiled threats resorted to by the appellant to whip Aitken into conformity with his desires were described by Aitken to include an allegation that Aitken owed his position as Permanent Secretary in that Ministry to the appellant's benevolence; that Aitken was unduly sensitive as former politicians had enriched themselves to far greater degrees and there was no official complaint; that with his double portfolio responsibilities i.e. of the Ministry of Labour and the Ministry of the Public Service, the appellant could effect transfers of even the most highly placed public officer "without a ripple". The appellant was impatient at what he termed "buck-shuffling" on the occasions that Aitken cautioned that there be conformity with financial regulations and would descend to vulgar language in rejecting Aitken's requests for receipts for the sums of money which Aitken paid over to him.

Aitken repeatedly professed in evidence that he considered himself a trustee of the funds which had been hived off from the Canadian account and put to the credit of accounts in his own name in Miami and willingly re-transferred the credit balances amounting to more than U.S. $552,000.00 to the Canadian account in July 1989.

Here we may leave Aitken's testimony and turn to the other principal prosecution witnesses. Of the several other witnesses who testified for the prosecution none was more emphatic than Ronan Critchlow. He had been promised the appointment as Chief Liaison Officer in Toronto, had made extensive domestic arrangements for re-locating himself and his family, but he was not confirmed in the position as he incurred the apellant's displeasure. Critchlow had the

unpleasant task of persuading a Bank Manager in Toronto on December 4, 1981 to open an account with the U.S. $50,000.00 cheque made paybale to the Permanent Secretary, which the appellant and Aitken had commanded him to negotiate and to obtain cash and cashier's cheques for the full amount, thus closing out the account.

Prior to the 4th of December, on a down-town shopping expedition the appellant identified certain household appliances in a shop window and later addressing Critchlow said: "Ronan, I would like to have the 'fridge, washing machine and dryer which we looked at, in Kingston, to coincide with my arrival when I get back". Critchlow asked for the money to effect the purchase. The appellant directed him to purchase them out of "the fund", which Critchlow understood to mean the operating funds of the Liaison Service. Critchlow refused to obey the instructions.

Critchlow told of how he was berated by the appellant for failing to equip the house, he had bought for the use of visiting dignitaries, with a telephone and of how he had insisted upon receiving written instructions from Aitken relative to the negotiation of the cheque. However that may be, on December 4, 1981, the appellant announced to Critchlow that "this thing will not work out" meaning that Critchlow's appointment as Liaison Officer would not be confirmed. To Critchlow's query as to what then should he do, the appellant said Critchlow would have a role with the programme which could be fulfilled from Jamaica. Disappointed, Critchlow returned home on December 7, 1981.

Noel Heron, a Civil Servant, has been assigned to the Liaison Service in Canada since its inception in 1966 and has been designated Chief Liaison Officer since 1984. He

described the legal framework of the Canadian Farm-Workers' Programmme and the transfer of the accounts from Ottawa to Toronto in 1981. 5% of each worker's wages is retained in Canada as an Operational Cess. Large surpluses were built up and consequently the excess over current operational expenses was placed in a savings account. Heron gave details of the operation of the current account. It was funded through (a) amounts received from Insurance Companies for the benefit of workers; (b) employers' deductions from wages and (c) insurance rebates, known as Retroactive Rate Credits. At the end of each month an insurance premium based on the end of month population in the programme, would be paid by the Liaison Service to W.I.C.L.O. through whose agency the insurance coverage was obtained and at the end of each season the Retroactive Rate Credits, received through W.I.C.L.O. would be brought to the credit of whatever account the Chairman of the Management Committee nominated.

Heron on the written request of Aitken, who wrote as Permanent Secretary, drew and cashed a cheque on the Liaison Service account for U.S. $10,000.00 which money he handed to Aitken in Miami on May 29, 1982, ostensibly to enable the Permanent Secretary to fund a computer project in the Ministry. Heron spoke of fifteen specific transactions, in all of which, at Aitken's request, a Canadian cheque was drawn and used to purchase a draft in U.S. dollars in the name of Aitken and either posted to him, or handed to him, at his option. Heron could not recall and had no note of the reason for the requests made for cheques drawn on:

19-11-82	for	U.S.	$ 5,000.00
18- 3-83	"	"	$10,000.00
30- 5-83	"	"	$ 5,000.00.

However cheque drawn on 22-7-83 for U.S. $30,000.00 was requested to "purchase necessary equipment in U.S.A." and cheques drawn on:

10- 8-83	for	$ 50,000.00
25-10-83	"	$100,000.00
4-12-84	"	$ 20,000.00
7-12-84	"	$ 3,100.00
7-10-85	"	$ 20,000.00
12-12-86	"	$ 25,000.00,

were all requested for "official purposes".

A draft prepared in Aitken's name for U.S. $270,000.00 on 23/7/84 and another for U.S. $142,473.32 dated 5/10/87 were both the proceeds of Term Deposits which formed a part of the savings accounts of the Liaison Service and which had matured and which on Aitken's instructions were not renewed in Canada. Heron produced cheques paid to Tokyo on 23/1/84 for Can. $11,745.30 and on 1/2/84 for Can. $3,378.69. There was one particular cheque for U.S. $14,755.57, part of the insurance rebate received from W.I.C.L.O. for the Canadian account, which on the instructions of Aitken, Heron held in Canada and handed it over to Aitken.

Harold Edwards, the Veteran Chief Liaison Officer of W.I.C.L.O. recalled paying to a bank in Belgium U.S. $13,000.00 in two cheques at the oral request of Aitken, later confirmed in writing, and he produced the cancelled cheques and the correspondence. He recalled too, that an insurance rebate cheque of U.S. $28,080.00 made payable to the Permanent Secretary was at Aitken's request cancelled and re-issued in

Aitken's name. On an occasion when he was attending an I.L.O. meeting in Geneva, Aitken requested money from the W.I.C.L.O. account and Edwards gave the necessary instructions to his deputy in Washington to forward the amount from W.I.C.L.O.'s funds. Edwards identified the cheques for U.S. $50,000.00; $3,000.00 and $2,000.00 drawn in favour of Aitken on November 5, 1981, of which Aitken had given detailed evidence, and Edwards produced the copy letter in which was forwarded the earlier cheque for U.S. $50,000.00 made payable to the Permanent Secretary. Edwards said he satisfied himself that all payments made to Aitken were on behalf of W.I.C.L.O.'s purposes. He, however, thought that Aitken had authority as Permanent Secretary or as Chairman of the Regional Labour Board to make the requests for money which Aitken did make.

Edwards testified that he had discussions with the appellant about the payments made from the 1% employers' contribution and the Retroactive Rate fund. The appellant discussed with him finances generally and asked Edwards to inform him of payments made either to or through Aitken. Accordingly Edwards wrote to the appellant on February 25, 1982 detailing payments to Aitken amounting to U.S. $112,500.00. A copy of the letter was admitted in evidence. Aitken had testified that he had told the appellant on his return from Washington that he had obtained U.S. $5,000.00 on his own behalf. To that the appellant had said that he knew as he had received a letter from W.I.C.L.O. to that effect and added: "Men like Edwards want all for themselves and do not know how to live and let live". It is reasonable to infer that the letter of which the appellant spoke was that of Edwards of February 25, 1982.

Aitken it is to be recalled said that the representations which he made to Edwards to obtain the two cheques of $50,000.00 each were false to his knowledge. He said he had told Edwards the plausible reason advanced by the appellant for the first $50,000.00 cheque and in conversation with Edwards, he had told him that the appellant had directed that the earlier cheque be put on hold, and that $50,000.00 in cash be obtained in its place and that for his second request the appellant had advanced no additional reason.

Other significant evidence adduced by the Crown came from Robert Brunnett, President and Manager of Riggs National Bank in Washington. He testified that W.I.C.L.O.'s account was debited to the tune of about $103,000.00 represented by the several cheques identified by Edwards. Then Brunnett went on to say that from his training and experience he could interpret certain notations appearing on cheques drawn on the Credit Suisse Bank of Miami, Florida, a bank with which he had no connection whatever. He was shown cheques, which were in evidence as exhibits 44-52, and opined that in each case the account was debited. On the evidence of Aitken seven of those cheques were endorsed for encashment by the appellant. Of course no evidence was led to contradict this assertion.

A Toyota Land Cruiser was ordered by the appellant from United Motors Ltd. and upon its arrival in Jamaica, it was cleared through United Motors. The importer was shown to be Hector's River Farms, a company of which the appellant is a Director and shareholder. The appellant who had communicated directly with the Management of United Motors in respect of this vehicle refused to pay the dealer's commission.

As to the equipment from Motorola Corporation, Mr. Mueller testified that the appellant discussed with him at Holiday Inn, Dreckle Points, Miami, the order for the purchase of a Digital Voice Protection Communications system, which Mueller had received from the Ministry of Labour, through Ruel Samuels Ltd.; that he discussed the equipment with the appellant at the home of Ruel Samuels in Kingston; that he received from the Ministry of Labour confirmation that the equipment was required for use by the Government of Jamaica; that the equipment was paid for through the Liaison Service in Canada, and that the parts of the equipment shown to him in Court conformed to that which he had supplied on the appellant's order.

For the sake of completeness the prosecution called a number of witnesses. Mr. Miller of Prestige Motors Ltd. processed an order for a Mercedes-Benz 280 SE from the appellant in August 1981. This order was subsequently cancelled as the appellant told Miller that he had got a better deal through Belgium, a point from which Mercedes-Benz can be obtained.

The appellant was at the material times a shareholder and a Director of M.S.S. Ltd., the company which installed the D.V.P. equipment obtained from Motorola. He was a shareholder of Rapid Repair and Maintenance Limited and the holder of 91,000 out of 295,000 shares in Hector's River Farms Ltd. The officers of the Ministry of Labour who received the Motorola equipment returned by the appellant also testified.

Anthony Irons, now Permanent Secretary in the Ministry of Labour, having received a Report from the Auditor General, spoke to the appellant on the telephone and thereafter visited him at his office in June 1989. In the conversation which ensued at the appellant's office Irons gave the appellant the

serial number of the Toyota Land Cruiser which from the Audit Report should have been in the possession of the Ministry. The appellant promised to check to see if he could find the Land Cruiser and to get back in touch with Irons. He did so on or before July 11, 1989 as on that day Motor Vehicle Certificate of Title in respect of a 1982 Toyota Land Cruiser was transferred from the appellant in whose name it had been registered to the Permanent Secretary, Ministry of Labour.

In the course of the interview the appellant wished to learn from Irons what was the gravamen of the Audit Report. To this Irons replied that Aitken would have to account for over Can. $900,000.00. At this the appellant said words to the effect:

> "But Tony, how can Probyn account for that type of money? Probyn can't account for that type of money".

As will be shown hereinafter, the learned Resident Magistrate drew inferences adverse to the appellant from this response.

Police officers in the course of their investigations visited the appellant's office on March 9, 1990 by mutual agreement. A brown Toyota Land Cruiser number 4968 was parked on the premises. Detective Supt. Williamson addressed the appellant in the presence of his attorney thus:

> "Is that the vehicle that was ordered from Japan through United Motors for you?"

He replied: "Yes".

Having obtained the keys for the vehicle the police took possession of the Land Cruiser.

At an earlier meeting with the appellant on February 15, 1990, Det. Supt. Williamson cautioned the appellant in the presence of his attorney and proceeded to ask him 177 questions and also produced for his inspection and comment a variety of documents. To each question the appellant's reply was: "No comment".

After the Crown had called twenty-five witnesses and tendered 122 exhibits, it closed its case. Defence Counsel made a no-case submission in the course of which he intimated that the defence did not propose to adduce any evidence. On July 2, at the close of the legal submissions by the defence and the prosecution the learned Resident Magistrate adjourned the hearing until July 19. He then called upon the appellant to answer all seven counts of the indictment. The defence formally rested on the no-case submission whereupon the Resident Magistrate declined to hear further submissions from the Crown but did not fetter Defence Counsel in his final address, after which verdicts of guilty were pronounced. The Resident Magistrate imposed sentences of imprisonment after hearing character evidence. His comments prior to sentence have formed the basis of one of the grounds of appeal.

We now turn to a consideration of the legal points raised. The first ground of appeal stated that "the learned trial judge failed to give adequate consideration or any consideration at all to the points of law raised at the trial". Particulars were supplied covering three distinct matters:

(a) that there was no jurisdiction for the learned Resident Magistrate to have tried the indictment for conspiracy on count 1;

(b) that count 1 of the indictment was bad for duplicity in circumstances where it alleged that two separate and distinct institutions namely the Jamaican Liaison Service/Canadian Farm-Workers Programme and the West Indies Central Labour Organization were to be defrauded;

(c) the finding that the money involved at the West Indies Central Labour Organization in Washington and the Jamaica Liaison Service/Canadian Farm-Workers Programme in Toronto was the property of the Government of Jamaica was an unreasonable finding which cannot be supported having regard to the evidence.

At common law the indictable misdemeanour of conspiracy is complete when two or more persons agree to carry into effect a plot to do an unlawful act or to do a lawful act by unlawful means. Willes J. in delivering the opinion of the Judges to questions put to them by the House of Lords said of the nature of conspiracy:

> "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. .... When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means".
>
> [Mulcahy v. The Queen (1868-70) 3-4 L.R.H.L. 306 at 317]

The argument advanced by the appellant was that on the allegations contained in count 1 of the indictment the object or purpose of the conspiracy was to obtain money outside of Jamaica, that is to say from Riggs National Bank, Washington, U.S.A. and Royal Bank of Canada, Toronto, Canada. In those circumstances, it was argued, it was irrelevant to the jurisdictional question where the agreement was concluded as the proper test to determine territorial jurisdiction would be to ask the question, if the conspiracy had been completely performed would the completed offence have been indictable in Jamaica? If no, then the alleged conspiracy was not triable in Jamaica.

Board of Trade v. Owen and Another [1957] A.C. 602 decided that agreements, made in England, to commit crimes or other unlawful acts out of the jurisdiction and in a country where criminal conspiracy was unknown to their law, did not amount to indictable offences in England. Lord Tucker explained the reason behind this decision. He said:

> "The gist of the offence being the agreement, whether or not the object is attained, it may be asked why should it not be indictable if the object is situate abroad. I think the answer to this is that it is necessary to recognize the offence to aid in the preservation of the Queen's peace and the maintenance of law and order within the realm with which, generally speaking, the criminal law is alone concerned".

He quoted at length from Vol. 4 of Holdsworth, History of English Law, and concluded:

> "Accepting the above as the historical basis of the crime of conspiracy, it seems to me, that the whole object of making such agreements punishable is to prevent the

> " commission of the substantive offence before it has even reached the stage of an attempt and that is it all part and parcel of the preservation of the Queen's peace within the realm. I cannot therefore accept the view that the locality of the acts to be done and of the object to be attained are matters irrelevant to the criminality of the agreement."

That statement of the law, dealing as it does, with the local jurisdiction of the Court over conspiracy charges at common law would be binding on the Courts of Jamaica. To this extent we accept the submission of Mr. Phipps that the law of Jamaica and the law of England as at the date of Owen's case, was the same. It means therefore that if the agreement is made in Jamaica, but the object of the agreement is to defraud persons outside of Jamaica and the acts in performance of the agreement are carried out abroad, the mere agreement in Jamaica would be insufficent to ground a charge of conspiracy to defraud.

In Board of Trade v. Owen (supra), Lord Tucker had left open the question whether a conspiracy in England which was to be wholly carried out abroad could be indictable in England upon proof that its performance would produce a public mischief in England or injure a person there by causing him damage abroad. That reserved question was setled in Attorney General's Reference (No. 1 of 1982) [1983] 2 All E.R. 721, where it was held that it was not enough to show that some incidental or consequential loss was suffered by third parties in England, in order to prove a conspiracy to defraud where the true object of the conspiracy was to be committed abroad. The applicable rule said Lord Lane C.J. is this:

> "The real question must in each case be what is the true object of the agreement entered into by the conspirators? ..... In each case, to determine the object of the conspiracy, the court must see what the defendants actually agreed to do".

In that case it was found that the agreement was made in England, that false labels were prepared in England for transmission to Germany where they would be affixed to bottles containing a large quantity of whisky and which would be shipped to Lebanon for sale there passing-off as the product of a reputable English manufacturer. The object of that conspiracy, the Court held, was to defraud purchasers of the whisky in Lebanon, and only incidentally would the holders of the copyright in the labels be damnified.

Who was the intended victim in the instant case? The Government of Jamaica, through one of its principal Ministries has negotiated programmes for the employment overseas of Jamaican farm labourers. The Organization W.I.C.L.O. in Washington acts as the Agent of the Government of Jamaica. It is not a body created by statute and may only use the funds of the Organization for the purposes of the Organization. If W.I.C.L.O. was dissolved there could be no question that surplus funds would belong to the Governments by which it was established. W.I.C.L.O. operated on the basis that the Chairman of the Regional Labour Board could demand funds for use at the Ministry of Labour in Kingston and that any payment it made to Ministry of Labour was for the welfare of the Jamaican workers. When it is recalled that Jamaica's contribution to the operation of the W.I.C.L.O. Scheme is comprised

of compulsory deductions made from the workers' wages and that this deduction is made in Kingston by the Ministry of Labour, which then forwards the amount to W.I.C.L.O., it becomes clear that although the Government of Jamaica has no beneficial interest in the funds in the hands of W.I.C.L.O., it holds the contributions on trust to use it for the sole purpose of the W.I.C.L.O. programme. Edwards in his letter to Aitken of October 21, 1981 enclosing the cheque for U.S. $50,000.00 clearly identifies the source of the funds. He said:

> " This amount is a portion of the 1% contribution being held in this office before transmission to Jamaica on behalf of Jamaican workers".

Aitkin's other request by letter of November 5, 1981 for the U.S. $55,000.00 was from this same 1% fund.

The Canadian Scheme was administered directly by the Government of Jamaica through a Management Committee of public officers and Liaison Officers paid directly from the Consolidated Fund with a "topping up" from the operational Cess. The Government of Jamaica had the clearest obligation to cause the Canadian accounts to be audited by the Auditor General who in fact audited these accounts up to 1981 and in 1989.

These farm-work programmes are essentially Government Schemes, administered entirely by the Government in one case and with a majority vote in the other case. Beneficiaries in these Schemes had no voice whatever in the negotiation for wages, in settling the terms of the agreement or in deciding whether or not to contribute to the Scheme. In our view W.I.C.L.O. was the agent of the Government of Jamaica in

respect of the Jamaican farm-workers in the U.S.A. and of the funds received from employers for the welfare of the Jamaican workers. The agreement tendered in evidence clearly identified Edwards as agent of the participating country. The Jamaican Liaison Service in Canada was undoubtedly an agent of the Government of Jamaica for the administration of the Canadian Farm-Workers Programme in that country. In our view the funds in the W.I.C.L.O. account which were earmarked for transmission to Jamaica and the funds in the Jamaican Liaison Service accounts in Canada fell within the definition of "public moneys", as being "any trust or other moneys held whether temporarily or otherwise, by an officer in his official capacity either alone or jointly with any other person, whether an officer or not." Section 2(1) of the F.A.A. Act.

In our view the aim of the appellant and Aitken, from their lofty positions of Minister of Labour and Permanent Secretary in that Ministry, was to bleed the funds of the farm-workers programmes administered by the Ministry of Labour, as an integral part of the Government of Jamaica. When in pursuance of this scheme funds were obtained from either programme these were in our view but overt acts within the conspiracy.

In R. v. Governor of Pentonville Prison, ex parte Osman [1989] 3 All E.R. 701, the Divisional Court had to consider, inter alia, what was the true object of the conspiracy, and on the facts of that case decided that it could not possibly be said that the loss of the Hong Kong Bank was only "a side effect or incidental consequence" of the conspiracy. It was, the Court held, the whole object from start to finish.

The Hong Kong Bank (B.M.F.L.) would in the course of business issue a dealing ticket in Hong Kong for the amount of a particular loan, followed by a confirmation slip. Thereafter B.M.F.L. would send a telex instruction to its correspondent bank in the United States, authorising the transfer of funds to the Carrian group's correspondent bank in the United States. That bank would in turn transfer the funds to the Carrian group's account in Hong Kong. Before authorising the telex instruction B.M.F.L. ensured that its correspondent bank in the United States was in funds. On issuing the telex instruction from Hong Kong there was no further act required to be done by B.M.F.L. for the funds to be transferred to the account of the Carrian group.

Although these facts are completely different from the facts in the instant case we derive assistance from the approach taken by the Court of Appeal in determining the object question. The argument for Osman was that the true object of the conspiracy was to deprive B.M.F.L. of dollars in the U.S.A. and consequently on the authority of the Attorney General's Reference No. 1 of 1982, the conspiracy was not triable in Hong Kong where the conspiratorial agreement was made. This argument was summarily rejected when the Court held that the object of the conspiracy was to defraud B.M.F.L. in Hong Kong, using the United States banks as the means to accomplish that end. In our view in the instant case the object of the conspiracy was to defraud the Government's farm-workers' programmes administered by the Ministry of Labour and the further activities of Aitken and the appellant were the means employed to this end.

The learned Resident Magistrate accepted jurisdiction to try the conspiracy count on the additional basis that overt acts in furtherance of the agreement were committed in Jamaica. In conspiracy cases a problem arises, when the acts or omissions constituting the offence take place in more than one country, for a Court to determine which country has jurisdiction to try the case. This difficulty was recognized by the Court in Osman's case. The House of Lords in D.P.P. v. Doot [1973] A.C. 807 held that conspiracy was a continuing offence. Viscount Dilhorne said at p. 823 that:

> "If it is, as in my opinion it is, a continuing offence then the courts of England, in my view, have jurisdiction to try the offence if, and only if, the evidence suffices to show that the conspiracy whenever or wherever it was formed was in existence when the accused were in England. Here the acts of the respondents in England, to which I have referred, suffice to show that they were acting in concert in pursuance of an existing agreement to import cannabis, to show that there was then within the jurisdiction a conspiracy to import cannabis resin to which they were parties."

And at page 825 of the Report, Viscount Dilhorne added:

> " The conclusion to which I have come ..... is that though the offence of conspiracy is complete when the agreement to do the unlawful act is made and it is not necessary for the prosecution to do more than prove the making of such an agreement, a conspiracy does not end with the making of the agreement. It continues so long as the parties to the agreement intend to carry it out. It may be joined by others, some may leave it.

> " Proof of acts done by the accused in this country may suffice to prove that there was at the time of those acts a conspiracy in existence in this country to which they were parties and, if that is proved, then the charge of conspiracy is within the jurisdiction of the English courts, even though the initial agreement was made outside the jurisdiction."

In D.P.P. v. Doot (supra) the plot had been hatched outside of England and in pursuance thereof two vans with cannabis concealed in them were shipped from Morocco to England enroute to the U.S.A. Because of the substantial overt acts which occurred in England, the Court held that those acts sufficed to establish the continuing existence of the conspiracy. It is to be observed that the charge of conspiracy to import cannabis was a distinct charge, separate and apart from a charge of possession of cannabis.

Overt acts in pursuance of the conspiracy can be treated as proof of the existence of the conspiracy. And if the overt acts in Jamaica are sufficiently substantial, they may go to prove that the conspiracy was partly performed here, whatever might have been the ultimate aim of the conspirators. We have held that the object of the conspiracy which was formed in Jamaica was to defraud the Government of Jamaica by the fraudulent utilization of trust funds in the hands of its two overseas agencies. It follows that if overt acts occurred in Jamaica in pursuance of that conspiracy they would go to prove the existence of the conspiracy in Jamaica. When Aitken wrote letters from the Ministry of Labour to W.I.C.L.O. requesting funds; when he wrote letters in Jamaica and made telephone calls in Jamaica, to the Jamaican Liaison Service in Toronto requesting that sums of money be transmitted to him, he was

avowedly acting in pursuance of the conspiracy. The functionaries at W.I.C.L.O. and in Toronto did not, to Aitken's knowledge consider that they had any power to refuse his demands for money, so that the letters and telephone calls from Kingston were the directives through which the moneys were obtained. Motorola equipment, and motor vehicles purchased from the farm-workers' funds were received in Jamaica by the appellant and placed at his exclusive disposal. His name was inscribed on the Motorola equipment and one of the Land Cruisers was licensed in his name. In our opinion, the overt acts found by the Resident Magistrate and those to which we have made reference herein would provide a further basis for conferring jurisdiction on the Jamaican Court to try count 1.

The appellant complained that count 1 of the indictment was bad for duplicity as it alleged that two separate and distinct institutions, viz., W.I.C.L.O. and the Canadian Farm-Workers Programme were to be defrauded. On the evidence, W.I.C.L.O. had its own administration in Washington and the Jamaican Liaison Service in Canada had its separate administration and whereas there was co-operation between the two administrations in placing insurance for farm-workers, they kept separate accounts. The link which we have found is that provided by the Ministry of Labour under which both programmes fall. At best these two Organizations are ad hoc committees pursuing governmental functions as agents of the Government, and more especially of the Ministry of Labour. We think that as the conspiracy was to defraud the farm-workers' programmes over which Aitken exercised executive control the fraudulent dealings with the funds were but overt acts in furtherance of the conspiracy. On this basis we found no merit in the complaint as to duplicity in the count.

Counts 2 - 7 of the indictment alleged that the appellant received in Jamaica various sums of money, contrary to section 46(4) of the Larceny Act. Ground 2 of the Grounds of Appeal complained that the Resident Magistrate failed to consider adquately or at all, the law, as it relates to the several receiving counts. In the supporting particulars it was said that the Resident Magistrate's jurisdiction to try an offence under section 46(4) of the Larceny Act was limited by section 268(1)(b) of the Judicature (Resident Magistrates) Act to those offences committed within his territorial jurisdiction. It was said further, that there was no proof:

> (i) that the property received as alleged in count 2 had in fact been obtained by misdemeanour and this to the knowledge of the appellant;
>
> (ii) that the property received as alleged in counts 3 - 7 had in fact been obtained by felony and that the appellant knew that it was so obtained.

Section 46 of the Larceny Act in sub-section 1 provides for the generality of receiving property knowing it to have been obtained in circumstances amounting to felony or misdemeanour and provides a penalty. Sub-section (2) of that section provides a penalty for knowingly receiving "any mail bag, postal article, chattel, money or valuable security, the stealing, taking, embezzling or secreting, whereof amounts to felony.

Then comes sub-section (4) which provides:

> "Every person who, without lawful excuse, receives or has in his possession any property stolen or obtained outside the Island, knowing it to have been stolen or obtained in any way whatsoever

> "under such circumstance, that if the act had been committed in the Island the person committing it would have been guilty of felony or misdemeanour, shall be guilty of an offence of the like degree (whether felony or misdemeanour), and on conviction thereof liable to imprisonment with hard labour for any term not exceeding seven years".

An offence under this sub-section is undoubtedly triable in a Circuit Court by Judge and jury. Mr. Phipps has argued that the Circuit Court is the only Court before which such an offence is cognizable having regard to the provisions of section 268(1)(b) of the Judicature (Resident Magistrates) Act. The Resident Magistrate's Court is a Court of limited jurisdiction. The venue jurisdiction of each such Court is limited to a single geographical parish in Jamaica with a limited extension of one mile into an adjoining parish. It is extended by section 9 of the Criminal Justice (Administration) Act - see R. v. York and Wynter [1978] 35 W.I.R. 490 at 494. But even within that geographical boundary, the Resident Magistrate's Court does not have jurisdiction to try all criminal offences committed therein. Section 268 of the jurisdictional statute enumerates the several offences triable by Resident Magistrates. From the Offences Against the Person Act are excluded murder, manslaughter and all felonious injuries. Felonies under the Forgery Act are similarly excepted. Under the Larceny Act offences of stealing a Will; title to land; original Court Records; a mail bag or the contents therefrom; certain frauds by trustees and company directors; etc.; are not triable by Resident Magistrates in that they are omitted from the enumeration in section 268 (1)(b). In sum, a Resident Magistrate's Court operates in a defined area and has jurisdiction over such criminal offences in that area as are prescribed by statute.

Section 46(4) removes any argument as to venue jurisdiction in relation to the place at which the principal offence was committed. It makes the receiving offence triable in Jamaica if according to Jamaican law the act of acquisition was felonious or amounted to a misdemeanour. Section 267 of the Judicature (Resident Magistrates) Act determines the geographical venue for the trial of offences by Resident Magistrates whereas section 268 enumerates the criminal offences which such Resident Magistrates may try.

Section 268(1)(b) by the use of the limiting phrase "where the stealing or obtaining of the property the subject of the charge is within the jurisdiction of such Courts" does not clothe the Resident Magistrate's Court with power to hear all cases of receiving or obtaining under section 46(4). What is excluded, in our view, is receiving or obtaining goods the proceeds of a principal offence which is not itself triable in the Resident Magistrate's Court. If the theft had been from a mail bag, or of a Will, offences not within the jurisdiction of the Resident Magistrate, the receiving would also not be triable within its jurisdiction. To give the reference in section 268(1)(b) of section 46(4) of the Larceny Act, any other interpretation, would be to render the provision meaningless.

The appellant complained that there was no proof that the property received as alleged in count 2 had in fact been obtained by misdemeanour and that the appellant knew that this was so obtained. Aitken's evidence is that the appellant said he had a need for the expenditure of about U.S. $50,000.00 in and around the Ministry of Labour and that Aitken should request that money from W.I.C.L.O. Aitken wrote to the Chief Liaison Officer in Washington on October 15, 1981, on official paper and signing himself as

Permanent Secretary and Chairman of the Regional Labour Board confirming an earlier telephone conversation in which the request for U.S. $50,000.00 had been made. Because the cheque in response to that request was made payable to the Permanent Secretary, Ministry of Labour, Aitken made a second approach to the Chief Liaison Officer for a further sum of U.S. $50,000.00 in cash. Aitken said he made the request at the insistence of the appellant. Edwards, the Chief Liaison Oficer, said he issued cheques totalling U.S. $55,000.00 on November 5, 1981 made payable to Aitken. He explained his understanding of the relationship between W.I.C.L.O. and Aitken thus:

> "The movement of funds in the account would be under the direction of the Chairman of the Board. Everytime he gave directions for cheques to be drawn it was within the scope of his authority".

Later to the direct question in cross-examination the the following evidence was elicited:

> "Q: Did you ever become aware that Mr. Aitken might have been taking funds other than for the organization's purposes?
>
> A: No Sir. Whatever cheques I had drawn on instructions of Mr. Aitken, I had satisfied myself that they were on behalf of the organization's purposes".

The reasonable inference to be drawn from Edwards' evidence is that Aitken told him of the purposes for which the funds were required. Aitken said he explained to Edwards that the appellant required U.S. $50,000.00 in cash and that the appellant had not given any further reason for that request, apart from the earlier one that he needed the money

for work in and around the Ministry of Labour. The reason advanced to Edwards was false. That the "boss" wished funds for an official project was good enough for Edwards and on this basis he released the funds. In our view the use of official stationery, the manner of signing the letters of October 15 and November 5, 1981, the telephone conversations and the oral statement made in Washington were the false precences made by Aitken which induced Edwards to part with the cheque which, when encashed, produced the U.S. $50,000.00 the subject of count 2. Not only did the appellant know of the false representations to be made by Aitken but on Aitken's evidence he was the father of those thoughts.

Mr. Phipps relied for his submissions on this ground, on ratio of Director of Public Prosecutions v. Nieser [1958] 3 All E.R. 662 at 666 where Diplock J. said:

> "On the other hand it is not sufficient merely to prove that the receiver knew that the property fell into the wider category of property which has been dishonestly obtained, for that is equally consistent with an erroneous belief that the property was obtained in circumstances which amount to felony and consequently falls short of establishing that degree of knowledge of the general category into which the property fell which we feel compelled to hold is an essential ingredient of the offence charged".

In Nieser's case the principal offender acted on her own in obtaining a Television Set and a Refrigerator and then selling them to Nieser. There was no evidence to show that Nieser was a part of the scheme to obtain either article and so knew the means used to so obtain them. Here the prosecution is saying that the appellant was the master-mind and

Aitken his hand-maiden. When the puppet-master required money Aitken danced to his specific tune. We do not think that anything in D.P.P. v. Nieser (supra) can aid the appellant, against whom the prosecution brought evidence of active participation throughout with respect to counts 2 - 7.

An important issue for determination in respect of counts 3 - 7 is to whom did the money belong which was in the Miami account at the Credit Suisse Bank. Aitken said he held it as a trustee for the Government of Jamaica. We have held that the accounts at the Jamaican Liaison Service in Canada were Government funds, that is to say, moneys held in trust by the Government for welfare of farm-workers in Canada. Aitken was at all material times a servant of the Government of Jamaica and did not cease to be so when he chaired a Management Committee established by Government to administer this programme.

Aitken's assertion that the funds standing in his own name in the bank at Credit Suisse Miami, were being held by him as Trustee for the Government is credible. On the evidence the conspirators intended to dip into the funds from time to time, using such methods as would not set off "alarm bells". The fact that a Liaison Officer in Miami had been approached to hold and manage the funds hived off from Canada suggests that there was no immediate intention to appropriate the funds so transferred. Two extremely large sums of money, representing the major savings of the Canadian programme were paid to Aitken when the deposits in which they were invested, matured. All this was recorded in Canada and no specific reason was given to Heron for the transmission to Aitken of those funds. Both sums were lodged to savings accounts in Miami and were made available for re-transfer to Toronto when the conspiratorial bubble burst. In addition, the comparatively small sums of money

which were withdrawn at any one time from the Miami account over the years, suggests that the account was not being operated as an account over which Aitken had sole beneficial interest.

On the assumption that there is credible evidence to prove the conspiracy, it is unlikely that the appellant would have placed himself in a position where he had no direct control of or over the funds but rather enabled his co-conspirator to be in an enviable financial position in hard currency. Of course on the evidence of Edwards, the appellant kept himself informed. In our view the inescapable inference to be drawn from the operation of the Miami accounts is that the funds which were paid directly to Aitken from the Toronto accounts remained and were intended to remain funds of the farm-work programme under the trusteeship of the Government of Jamaica. Aitken was, as he said, acting as agent of the Government of Jamaica when he opened and operated the current account at Credit Suisse. There was evidence that on occasions withdrawals were made from this account for official purposes, viz., to defray expenses for overseas official delegation. When the appellant requested Aitken to draw funds from the Miami account for the appellant's purposes, the appellant knew that for Aitken to comply, Aitken would either have to commit the felony of larceny as a servant or embezzlement in order to comply with his request, as the Miami funds were part of the Canadian farm-workers' funds. On this basis we are of the view that the prosecution led evidence capable of proving all the essential ingredients of receiving charged in counts 3 - 7.

Ground 7B must be set out fully. It complained that:

> " The evidence of the conspirator, Probyn Aitken was not admissible against the apellant at the trial to prove the existence of the conspiracy, there being no independent evidence of the overall conspiracy.
>
> The learned Resident Magistrate admitted the evidence of Probyn Aitken on the sole basis of accomplice evidence and then proceeded to use it as proof of the existence of the conspiracy without deciding whether or not there was other evidence in the case to establish such conspiracy in order to make the testimony, acts and declarations of Probyn Aitken admissible against the appellant."

As we understand it, where two persons are engaged in a common enterprise, the acts and declarations of one in pursuance of that common purpose are admissible against the other. Mr. Phipps submitted that there must be independent evidence of the existence of the conspiracy irrespective of the time in the course of the trial at which such evidence was adduced. On the authority of R. v. Donat [1960] 82 Cr. App. R. 173 and R. v. Governor of Pentonville Prison, ex p.(supra) we agree that there must always be some evidence, other than the hearsay evidence of a fellow conspirator to prove that a particular defendant is a party to a conspiracy. Provided, however, that there is some other evidence, it does not matter in which order the evidence is adduced. We use 'Hearsay' in the sense that the matters of which the conspirator gives evidence were done and said in the absence of the other conspirator(s).

We have had occasion to refer earlier to the evidence of Critchlow concerning the instructions he was given by the appellant to change the U.S. $50,000.00 cheque made payable to the Permanent Secretary; to the appellant's directions to him to purchase household equipment out of the farm-workers' fund; and of the appellant discarding him as Chief Liaison Officer on the appellant's perception that Critichlow would not tamely do his bidding. The evidence which relates to the Land Cruiser registered in the appellant's name, inscribed with the appellant's initials, to the Motorola equipment together with Critchlow's evidence provided ample corroboration for Aitken's testimony that there was an overall conspiracy to plunder the farm-workers' funds and that the appellant was a participant therein. The import of the evidence of Edwards, that the appellant asked him for a written account of all moneys paid to or through Aitken, must never be over-looked as more than anything else it discloses the appellant's intimate knowledge of Aitken's activities. On these bases we held that Aitken's evidence was admissible against the appellant.

In Ground 7 there was the complaint that the Resident Magistrate wrongly admitted in evidence various documents, copy documents and opinion testimony. We find that Robert Brunnett, with 38 years experience in banking at Riggs Bank, Washington, with three years prior training in banking at Reuters School in New Jersey, had the expertise to explain the meaning of bank stamps which appeared on the cheques drawn on W.I.C.L.O.'s account at Riggs Bank, Washington. We find too that from his knowledge of banking in the several States of the U.S.A. he was competent to interpret the notations on the cheques drawn by Aitken on the Credit Suisse Bank in Miami.

Aitken who had drawn cheques looked at micro-film copies of the cheques and identified them as true copies of the originals. There was no suggestion that any tampering had taken place in the course of the micro-filming. Aitken said that over a period of years he had moved house on several occasions and many original documents including cancelled cheques had been mislaid. In those circumstances, the best evidence available were the micro-film copies. The absence of evidence from the individuals who did the micro-filming did not in our view render the copies, which were authenticated by the sworn testimony of Aitken, inadmissible.

There was no direct evidence that the letter, Ex. 19, written by Edwards and addressed to the appellant was ever received by him. It was admitted for the limited purpose of showing that Edwards had acted upon the appellant's request. Even if this was an insufficient reason for the admission of Ex. 19 the appellant could not in any way be prejudiced as Edwards had given oral evidence of the appellant's request for the specific information.

Grounds IV, V and VI all relate to the conduct of the learned Resident Magistrate when he finally disposed of the case. Firstly, in ruling that there was a case to answer, he did not give any reasons. This is the approach sanctioned by this Court. Having ruled that there was a case to answer, the learned Magistrate decided not to call upon the Crown to address him a second time.

Section 280(2) of the Judicature (Resident Magistrates) Act provides that at the close of the prosecution's case on a trial on indictment, the Resident Magistrate shall enquire if the accused intends to call evidence for

the defence and if Counsel decides not to do so, the Resident Magistrate shall enable Counsel for the prosecution to address him a second time to sum-up his case and to allow Counsel for each accused to reply. This subsection does not specifically give Defence Counsel the right to make submissions at the end of the prosecution's case, but the Jamaican practice is for the defence to make full submissions on the law and the evidence at that stage if it is desired to submit that the prosecution has not made out a prima facie case. In the instant case, the defence intimated in the course of its no-case submission that however the Magistrate ruled, the defence would not be adducing any evidence. Consequently when the prosecution replied to the defence submissions it would be expected to deal with all relevant questions of law and fact relied on by the defence and generally. When later the Resident Magistrate indicated that he did not wish to hear a second speech from the prosecution, if the Crown had any new argument to place before the Court, one would have expected the learned Director of Public Prosecutions so to indicate.

We do not accept the argument of Counsel for the appellant that the Magistrate demonstrated by not requiring a second speech from the prosecution that he had already made up his mind to convict although the case was not then completed. The Magistrate might have felt that a strong prima facie case had been made out which could not have been improved upon by the prosecution, having regard to their full earlier submissions. Indeed we are inclined to think that without a second speech from the prosecution, the defence was given a real advantage to try to persuade the Resident Magistrate not to convict notwithstanding his ruling as to a prima facie case. In his rulings in the

case and in his patience in trying a difficult case over a long period of time, the learned Resident Magistrate exhibited commendable judicial balance. We are satisfied that there is no merit whatever in the submission that there was a pre-mature determination of this case.

In passing sentence a trial judge is entitled to comment upon any extraordinary feature in the conduct of the case which will impact upon the type of sentence to be imposed. Complaint is made of the following remarks of the learned Resident Magistrate.

> "His conduct emanated from an excess of greed and was fueled by what must have been a supreme feeling of contempt for the Government of which he was a part and for the People of Jamaica.
>
> It may be fair to say that he demonstrated this same contempt towards the Judicial System of this country:
>
> 1. By his attitude when questioned by Superintendent Williamson. ("No comment" to some 177 questions) and
>
> 2. His refusal to answer to the charges on which he was indicted. This however, is his privilege and his right in law".

These were very strong comments but in our view it cannot be fairly inferred that the learned Magistrate drew adverse inferences against the appellant due to his failure to co-operate with the police and to give evidence on his own behalf. At all material times the appellant was being advised by his attorneys-at-law, and the Magistrate acknowledged that fact in his comments. Against a former Cabinet Minister the most horrendous charges were

made and he elected to stand on his constitutional rights to remain silent in the face of the accusation and not to say one mumbling word. The Magistrate said and he meant to convey that not one single mitigating factor had been advanced on behalf of the appellant other than his previous good character and in consequence the appellant would have to suffer the utmost consequences. On the evidence and having regard to the conduct of the defence, we can find no fault in the firm stance adopted by the Resident Magistrate.

A sweeping-up ground of appeal was added viz., that the verdict was unreasonable and unsupported by the evidence. We did not think for the reasons we have advanced on the several individual grounds herein, that there was any merit in that ground.

As we earlier indicated we dismissed the appeals against convictions, and reduced the sentences on the receiving counts, as we found no merit in the grounds so ably argued by Counsel for the defence.