C. A. CRIMINAL LAW - appeal from R.M. Court - (1) Conspiracy to defraud (2) Several counts
Br. S4. Corruption Prevention Act (Prosecution alleges unlawful dealings in award of trading entities
to sell goods to Ministry at exhorbitant prices)
Whether verdict unreasonable - whether essential elements constituting offence
of conspiracy to defraud had not been proved - whether inadmissible
evidence admitted.
Indictment - amendment - Power of C.A. to amend - S302 Judicature (Resident Magistrates) Act
(C.A. exercises power to amend & misjoinder)

[Appeals against conviction dismissed (with exception of one count against Litchmore for receiving a gratuity)]

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 45/86

Sentences
Appeals against sentences allowed — sentences varied

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

REGINA

Cases referred to
Myers v DPP. (1964) 2 All ER 881
Paulette Williams (R.M. Appeal No 25/79 (unreported))
Regina v Wilson (1980) 2 All ER 81
R v Hubert Stewart (unreported) P.C. 36/81
R v Jacobs 30 Cr App R
R v Harry Hardy and others (1981) 72 Cr. App. Rep 247
Scott v Metropolitan Police Commissioner (1974) 60 Cr App R. (1975) 124
London and Globe Finance Corporation Ltd (1903) 1 Ch 732.
Reg v De Kromme (1892) XVII Cox 492

VS.

OWEN HIGGINS
DELROY LITCHMORE
TREVOR EVANS
EWART MCBEAN
NORMAN BLAKE

→ delivered 28/7/82.

Messrs. Carl Rattray, Q.C., K. D. Knight and Robert Pickersgill for Higgins, Litchmore, Evans and McBean

Messrs. Carl Rattray, Q.C., and K. C. Neita for Blake

Mr. G. R. Andrade, Q.C., Deputy Director of Public Prosecutions and Mr. Garth McBean for the Crown

October 27-31; December 15-19, 1986
and September 25, 1987

KERR, J.A.:

The apppellant Blake is a private businessman and the other appellants were at the material time civil servants in the Ministry of Construction and Works. They were jointly charged and after a trial lasting seventeen days convicted on February 28, 1985, in the Kingston Resident Magistrate's Court on fourteen counts of an indictment of twenty-four counts as follows:

The five appellants were convicted on the first count for conspiracy to defraud. The particulars of which read:

"Owen Higgins, Delroy Litchmore, Trevor Evans, Ewart McBean and Norman Blake, on divers days between the 1st day of February, 1981 and the

"30th day of October, 1981 in the parish of Saint Andrew, conspired together and with Jamaica Industrial Supply Company Limited and other persons to defraud the Ministry of Construction (Works) of such sums of money as might be realized from fraudulently raising, fixing and maintaining prices of goods purchased for or on behalf of the said Ministry of Construction (Works)."

The four civil servants were convicted on separate counts which charged them individually for breaches of Section 4 of the Corruption Prevention Act that being a public servant each obtained a gratification from the Jamaica Supply Company Limited for showing favour to the said company thus:

HIGGINS:

On two counts for obtaining $600.00 on 24th April and 29th May, 1981, respectively.

LITCHMORE:

On three counts for obtaining $300.00 on 30th April and 29th May, 1981, respectively and $600.00 on 20th June, 1981.

MCBEAN:

On three counts for obtaining $600.00 on 2nd April, 29th May and 1st September, 1981 respectively.

EVANS:

On five counts for obtaining $600.00 on the 24th April, 22nd May and 26th June, 1981, respectively and $300.00 on 1st and 16th September, 1981, respectively.

It was the theory of the prosecution that all five appellants devised a scheme whereby they formed trading entities known as J.A.M.C.O. Ltd. and Jamaica Industrial Supplies Company Limited, which names were similar to or slight variants of the business names of other entities, and by representing these entities as suppliers and distributors of goods when in fact they were middlemen - buying and selling at a profit - with the connivance and aid of Higgins, Litchmore, McBean and Evans, approved and accredited suppliers and distributors would be by-passed and goods would be sold to the Ministry and were in fact so sold, at exorbitant prices fixed by them. The charges for breaches of the Prevention of Corruption Act were to the effect that for thus fraudulently channelling orders to the Jamaica

Industrial Supply Company Limited (J.I.S. Co.) they received the amounts alleged albeit in the case of Higgins, McBean and Evans under the colour of services rendered as Directors in the company.

The nature of the defence, shortly put, was that the entities were legitimate business enterprises, formed for lawful trading with Government Ministries, amongst other customers, and that the money received by the civil servants were in their private capacities for services rendered.

The main challenge to the convictions was on the ground that the verdict was unreasonable and cannot be supported having regard to the evidence and in particular in relation to Count 1, that the essential elements constituting the offence had not been proved. In order to maintain his contention, Mr. Rattray critically analysed the evidence tendered by the prosecution. In turn, we are constrained to carefully and comprehensively consider that evidence. Our task has been rendered the more onerous by an unhelpful presentation of the prosecution's case, in which witnesses were often called to give evidence on matters of which they had slight, or no personal knowledge, or to introduce in evidence exhibits of which they could do no more than generally categorize. Further, a number of documents relating to numerous transactions were tendered, but no credible or admissible evidence was adduced that the prices of the goods therein were exorbitant. Indeed such evidence of exorbitant prices as there was, related to three items, viz, motor oil, thinner and brake fluid.

The prosecution had endeavoured to give evidence of the prices of goods in other transactions through the Auditor, Winston Letts, but such was properly excluded, as based on hearsay. So while the volume of business between the Ministry and the appellants' companies was relevant to showing favour, the details of all transactions, save those as to exorbitant prices, were unnecessary. It is therefore understandable when, at the trial, Mr. Knight, before making his no-case submission sought, but without success, an identification of the evidence on which the prosecution was relying in proof of Count 1.

At the material time, there existed in the Ministry of Construction and Works a Department of Electrical and Mechanical Services (D.E.M.S.) and the head of that department was styled a "Director". In that department, Hines was the Director, Higgins the Senior Executive Engineer, McBean the Accountant, Evans his Assistant and Litchmore "the Purchasing Officer". In this department was set up a fund, known as the Hire Purchase Fund and McBean was in charge of that fund. The fund was designed to purchase spare parts and other incidentals for the rolling stock from funds earned or augmented by hireage of certain machines. According to Reginald Dunkley, the then Permanent Secretary in the Ministry, the fund was never used to purchase goods from abroad and there was no authority for so doing. Further, there was no authority to deal with middlemen. This policy was to purchase goods from approved suppliers of which there was an established list.

According to Robert Marsh, the Minister of State, the Ministry of Construction and Works had contracts for the purchase of oil from the Oil Companies, Shell, Esso and Texaco.

According to Joseph Smith, Director of Finance and Administration in the Ministry of Finance, to get on the list of approved suppliers, an application must be made to the Ministry and a check is made on the applicant by a Supply Officer. The criteria for inclusion in the list include: warehousing facilities, adequate finance and staffing. If the application is granted the applicant would be notified in writing and assigned a computer number. Neither J.A.M.C.O. nor J.I.S. Co. was on the list of approved suppliers. In cross-examination, Dunkley said that the purpose of having approved suppliers would be to protect Government funds in relation to prices and specifications. He admitted that if approved suppliers were out of stock of urgently needed parts for the vehicles, purchases could be made from non-approved suppliers.

A Circular out of the Ministry of Finance, No. 4 dated 24th February, 1978 was tendered. The second paragraph reads:

"Permenant Secretaries and Heads of Departments may now purchase from any available source, the supplies required by them, up to the limit of the provisions made for that purpose in their approved Estimates, with the exception of:

(1) Goods which are not available locally and have to be imported.

(2) Goods shown on the attached schedule, and

(3) Goods which are the subject of standing contracts awarded by the Minister on the advice of the Supply Advisory Committee."

Winston Letts gave evidence that under the system obtaining in the D.E.M.S. a request or requisition for goods would be made from the stores. The purchasing officer would prepare the necessary invoice orders drawn on a supplier selected from the list of approved suppliers.

As purchasing officer, Litchmore had no authority to originate orders, to approve of orders or authorize payments.

Two copies of the invoice orders would be sent to the supplier who, when the order is filled, would attach his bill and return it with the appropriate copy of the invoice. Upon the store advising receipt and approval of the goods, payment would be approved by the appropriate officer on appropriate payment vouchers. Higgins was authorized to approve payment to the extent of $10,000. Above that and up to $30,000 approval by a Director of the D.E.M.S. must be sought.

Evidence concerning the founding of J.A.M.C.O. and J.I.S. Co. Ltd. was given by Hugh Richards, Accountant and Company Director. He said that in November, 1980, Blake with whom he had been associated in business from 1974, told him of plans to form a company and to that end there was a meeting at his home at Stilwell Road in early 1981. Amongst those present there, were Blake, Higgins and Evans. Blake introduced Higgins as Engineer in the Ministry of Construction and as a prospective Director and Evans as an Accountant in the same Ministry. The name J.A.M.C.O. was decided on. He said the purpose of the company was to obtain orders from and supply goods to the Ministry of Construction and other Ministries. Their attorney, a Mr. Wilson, later advised that there was already a company on the Register

as J.A.M.C.O. and their company could not be registered under that name. The name "Jamaica Industrial Supplies" was then chosen.

In the meantime there had been trading under the name of J.A.M.C.O. and a bank account in that name had been opened in the Bank of Commerce, Knutsford Boulevard Branch. They carried no stock on hand and had no store house. They bought and sold at a profit with markups from ten to twenty percent. Blake was Managing Director and he Richards, financial controller. Their company under the new name of Jamaica Industrial Supplies Company Limited was duly registered with Blake, Evans, Higgins, McBean, a Mr. Jangalee and himself as Directors. The company's overdraft facilities were guaranteed by Blake and himself.

It was for channelling orders to the company that Higgins and other officers of the Ministry were made Directors and as Directors were entitled to an equal share of profits or losses and had the perquisite of signing on the company's account for food and beverages and entertainment. Apart from Blake, each Director was paid $600 per month and a promise was made to provide a company vehicle for each Director as soon as the company was in a position financially to do so. Richards gave evidence of Directors' meetings and of routine matters discussed at the meetings and of the running of the affairs of the company and of the payments to the appellants of the amounts for which they were subsequently charged for breaches of the Prevention of Corruption Act.

J.A.M.C.O. neither sought nor ever was an approved supplier. There was a letter of 8th February, 1981 by Blake as Managing Director of J.A.M.C.O. Ltd. to the Ministry of Construction advising of the company's facilities thus:

JAMCO Ltd., Industrial Supplies
New Kingston Hotel, Knutsford Boulevard
P.O. Box 83, Kingston
Phone: 65430, Ext. 2012-14

8th Feb, 1981

Ministry of Construction
1 Industrial Terrace
Kingston 14.

Dear Sir,

JAMCO LTD. since its inception has been working along with the Government through various ministries.

JAMCO has the following facilities:

(1) Providing Purchasing Services and Finance in all facets of Industrial Equipment and Supplies.

(2) Procurring funding up to US$20,000,000 (Twenty million Dollars). This amount is at our immediate disposal with moderate terms of 60 days - 5 years.

(3) JAMCO has allocated US1.3 Million Dollars in a "No Fund Revolving Basis". Expecially for Hospital Equipment, Public Utilities and Agriculture.

It would be in the interest of the relevant authorities to take advantage of these facilities, so as to ease our Foreign Exchange Situation.

Yours truly,

/s/ N. W. Blake
Managing Director."

As to that Richards said that the company did not have the funds mentioned therein. There was also exhibited a letter of July 17, 1981 to the Ministry of Construction advising inter alia:

"(1) .....

(2) .....

(3) ORDER DEPT. AND EXECUTIVE OFFICES New Kingston Hotel Complex

Warehouse - 5000 sq. ft at Lady Musgrave Road.

4000 sq. ft at Omara Road."

Richards said that the premises on Lady Musgrave Road were rented but never used and they had nothing on Omara Road.

To show that the appellants' entities were in officers and shareholders different to other business enterprises of the same or similar trade names, Thelma White, Administrative Officer in the Office of the Registrar of Company tendered Certificate of Registration of J.A.M.C.O. Ltd. dated 3rd September, 1986.

Mr. Ronald Bitter, a Company Director gave evidence that as R. A. Bitter he traded under the name of Jamaica Industrial Supplies Company H.O.W. Service. The business name of "Jamaica Industrial Supply" was registered from 1961 with the Department of Supplies. The registration of this business name expired in 1964. Recently he has done little business under that trade name. Miss White tendered the Certificate of Registration showing Bitter as the proprietor. This business was registered as a supplier with the Jamaica Industrial Supply Company in 1961 and transacted business with the Ministry of Construction.

Winston Letts, in the course of his audit done on the instructions of the Permanent Secretary found in the drawers of Litchmore a number of documents which were exhibited. These include payment/order vouchers and returned cheques in favour of J.A.M.C.O. There were blank payment vouchers and copies of invoice without payment vouchers attached and which Litchmore said were orders to be sent off to J.A.M.C.O. for goods. Higgins signature was on two of the blank payment vouchers. The total cheques payable to J.A.M.C.O. on the vouchers during 1981 amounted to $178,543.88. Richards however said according to his ledger, the amount received from the Ministry of Construction to July, 1981 amounted to $263,621.37.

Evidence tending to prove the sale and delivery of oil to the Ministry and at exorbitant prices was given by three witnesses, (1) Joseph Hunter, haulage contractor who said he did haulage work for J.A.M.C.O. which had its office in the Sheraton Hotel, New Kingston. In June, 1981 he personally made delivery of oil in 45 gallon drums, to the Montego Bay Public Works Department of the Ministry; (11) Rupert Lewis, the Acting Executive Engineer in charge of the Montego Bay P.W.D. Workshop who said that in June, 1981 Frank Rosewell, the storekeeper, brought to his attention a

quantity of lubrication oil in drums delivered there. There was no use then for this oil as there was adequate supplies there. The oil was not ordered by the Montego Bay Workshop. The facilities for storage there were for bulk oil of thirty grade. This oil was in forty gallon drums. Prior to this, no forty gallon drums were sent; (iii) Hugh Thompson, Industrial Marketing Manager for Shell said that their prices for oil, engine and transmission to the Ministry of Construction, unlike large users such as the Bauxite Companies and Sugar Estates, were not special prices but ordinary market prices. An order of thirty-three drums would be sufficient quantity for delivery by the company's truck. Rotella TX 40 in drums of forty-six imperial gallons for period: 1/6/81-9/6/81 was $398.50 and between 10/6/81-23/6/81, $454.00. It never went as high as $540.00 per drum in 1981. There is no such oil as Shell Rotella TX 10.

There were three payment vouchers in respect of this single transaction:- No. 11706 - 12 drums for $5,085.92; No. 11664 - 15 drums for $9,536.10; No. 11671 - 10 drums for $6,357.40 - all at $635.74 per drum in favour of J.A.M.C.O. These payment vouchers were signed by Higgins as authorising purchase, by Litchmore recommending payment and again by Higgins authorising payments on dates ranging between 22nd to 24th June, 1981.

The inference to be drawn from preparing three payment vouchers in respect of one order was to bring the amount on each voucher within the limit of $10,000 and thus within Higgins' competence to authorise payment. Further according to the witness Lettman, an order for oil would not fall under Higgins' functions; orders for oil should go through the Department of Supplies.

Norris Crooks, Industrial Sales Manager, employed to Esso said that in 1981 there was a signed agreement with D.E.M.S.

for the supply of oil. Forty grade oil was generally supplied in bulk or 45 gallon drums. He recalled the highest price was $389 per drum but in 1981 it would be about $295. Payment for oil supplied would be made by the Department of Supplies.

With respect to the price of "thinner", Ruth Hall, Supervisor employed to Sherwin Williams M.D. Limited, tendered in evidence a copy of a bill dated 13th May, 1981 made out to J.A.M.C.O. and covering a sale of thinner:-

1 drum Enamel Thinner - 54 gallons for $1,134

2 drums Duco Thinner for $2,268

2 drums Duco - Enamel Thinner - $2,268

and said these were regular retail prices and not distributors prices. There was a discount of 10% given to J.A.M.C.O. so that the net amount paid on the bill was $5,103. The prices that year were constant. She never sold to J.A.M.C.O. duco or enamel thinner at the price of $1,711.40 per drum nor any thinner in March 1981 at the price of $1,665 per drum. She personally sold the goods on the invoice. The original was handed to the bearer from J.A.M.C.O. In cross-examination, she said the bearer told her, he was from J.A.M.C.O., New Kingston - she did not personally know him. The thinner as per payment voucher 10438 with Higgins as authorising purchase was sold to the Department for $8,557.

Phillip Lowe, Financial Controller of Caribbean Brake Products Limited, said his company manufactured brake fluids. In 1981 there were two brands, 'Carib Brake Premium' and 'Special' and in four sizes. In May 1981,10 cases of Carib Brake Premium was at $253 per case but in June 1981 it was reduced to $203. It was never up to $354.80. There are 48 quarter litre tins in a case. He tendered a copy of a bill dated 11th August, 1981 for the sale of 10 cases of $\frac{1}{4}$ litre brake fluid to J.A.M.C.O. at $253 per case $2,530. He admitted in cross-examination that he did not personally prepare bills. Ten cases of $\frac{1}{2}$ litre brake fluid - 24 tins - would cost $237 per case. His company supplied the Ministry of Construction with brake fluid. Credit was withdrawn from the Ministry at some time but he could not recall the year.

Hugh Richards said that the brake fluid bought from Carib Brake for $2,530 was sold to the Ministry for $3,548. The relevant payment voucher No. 08429 was signed by Higgins as purchasing officer authorising purchase.

The investigating officer, Detective Sergeant Wilks, in evidence reviewed the course of his investigations and he tendered recorded statements of his interrogation of the appellants Blake and McBean. On information received from Blake he visited Lady Musgrave Road where he saw no warehouse facilities.

When called upon, the appellants gave unsworn statements. Higgins said he held a BSc. degree in Mechanical Engineering; that after 7 years service in the Ministry of Construction, he left to pursue a post-graduate course in Industrial Management but rejoined the service in 1980 as Senior Executive Engineer Administrator - Public Works Department of the Ministry of Construction. Shortly after joining, there was a change in the political directorate and directives were issued to upgrade the fleet of vehicles to a 70% availability for new projects to be financed by international institutions - World Bank, U.S.A.I.D., Inter-American Bank. Simultaneously, the stores and purchasing sections under his jurisdiction were being reorganized by a team headed by a Dennis Roley, World Bank Consultant, with the intention of getting rid of the old card index system of stock control because of inherent deficiencies in that system. One of the main deficiencies was that the stock card system could not show a possible or approved supplier and therefore when goods were needed, resort had to be made to the Yellow Pages section of the telephone directory. This was costly and also resulted in a backlog of unfilled orders. After meetings with workshop heads, branch heads, Directors and Roley, a decision was taken to canvas for possible suppliers. These suppliers could only obtain the status of approved suppliers by performance and not on the basis of balance sheets and Bank references. The authority to determine who were approved suppliers, now rested in the workshop head. The appellant Blake was on the list of grade B contractors before he rejoined the service.

His company come to be recognized and accredited, because the company was able to deliver the goods. He had performed consultancy service and a feasibility study for this company. The payments he received were with reference to expense incurred as result of such services. He had performed similar services to other bodies with Government sanction. He did not at any time conspire with Blake to raise or fix prices of any item supplied to the Ministry.

Litchmore's brief statement was to the effect that the money received by him from J.A.M.C.O. was for assisting with advice on stock control. He denied being involved in any conspiracy to defraud.

Evans said that as accountant, his duties were specifically to be in charge of the Mechanical and Electrical Section and the pipe-making plant at Harbour Head. He had authority to sign cheques on behalf of this division. He accepted the position of director in the J.I.S.Co. Limited but he was not then aware of the Staff Orders which required that he should first seek permission of Government. As Hugh Richards said in evidence, his sentiment was strong against overpricing. He would never affix his signature to any cheque or document if he knew that the prices of the goods were not fair and reasonable. In ignorance, he became a director and he did not know receiving the money as such, was illegal. He did not conspire with anyone; he did not corruptly receive any money.

McBean said he assumed duties in the Hire Fund Scheme on 1st April, 1980. He carried out his responsibilities as financial controller of the scheme with integrity and honesty. He did not conspire with anyone nor was he corrupted by anyone. His association with Jamaica Industrial Supplies relate to a project in respect to solar water heating for hotels and hospitals on which he was working in 1981. He did research with Honeywell Corporation of Pennsylvania, U.S.A. with a view to forming a joint venture with the Jamaican Company in the development of this project. It was for this he was paid $600 on three different occasions.

Blake said he was a businessman. Jamaica Industrial Supplies Limited supplied goods to various organisations including the Ministry of

Construction. The company engaged employees in procuring goods where available - local and abroad. The supplying of oil to Montego Bay was one of such transactions. Normal expenses incurred "re transportation" were added. He never conspired with the other appellants to defraud the Government or to raise, fix or maintain prices of goods.

Before dealing with the main ground of appeal challenging the evidential worth of the case for the prosecution, it seems convenient to deal first with a number of subsidiary or subordinate grounds of appeal.

It was contended by appellants' counsel that certain documentary evidence admitted in evidence by the learned Resident Magistrate was inadmissible as (1) the evidence was in breach of the hearsay rule in that the documents (a) did not originate or were not connected with the appellants (b) were admitted through incompetent witnesses and (2) failed to satisfy the test of being of any probative value in relation to the offences charged. Further, that the evidence from the officers from the Banks was hearsay evidence as not falling within any common law or statutory exceptions and should have been excluded and that for the same reasons, the copy bills tendered by Ruth Hall and Phillip Lowe purporting to show that 'brake fluid' and 'thinner' were sold to J.A.M.C.O. were wrongly admitted.

Now in the case of Ruth Hall, her evidence was to the effect that she personally made the sale of the goods recorded in the bill and spoke from her personal knowledge. A subpoena duces tecum had been served on the defence. Accordingly to that extent the copy bill as secondary evidence was admissible through her. However, the probative value of her evidence was weakened by her admission that she did not know the bearer and apparently she relied on his word that he was from J.A.M.C.O. However, Hugh Richards gave evidence supporting Ruth Hall as to the purchase of thinner from her company. On the other hand, Phillip Lowe admitted that the bills tendered, were not prepared by him and he had nothing to do with the preparation of bills. Accordingly, he was incompetent to tender the copy bills (see Myers v. D.P.P. [1964] 2 All E.R. 881). However, Richards gave evidence that indeed brake fluid was purchased for the price of $2,530 and resold to the

Ministry in March 1981 for $3,548. Both Ruth Hall and Phillip Lowe gave evidence of the going price of those goods and their evidence on that has not been challenged or traversed.

Objections were also taken in the court below, against the tendering by the Bank officials of micro-films of cheques and lodgment slips and their admissibility was the subject of complaint on appeal.

Diana Cunningham, the supervisor of the Archives and Records of the Duke Street Branch of the Royal Bank (Ja.) Ltd. gave evidence of the system of micro-filming cheques processed by the Bank before returning them to the drawer or Bank on which they are drawn. She said she operated the micro-filming apparatus and personally certified the films produced, as true and accurate. In that regard, we hold that this rendered her evidence distinguishable from that held inadmissible in R. v. Paulette Williams (R.M. Appeal No. 25/79) [unreported]. See Barker v. Wilson [1980] 2 All E.R. 81. She produced micro-films of cheques drawn in favour of appellant Evans with deposit slips covering lodgments to the credit of his account.

Similar objections were made to the evidence given by other Bank officials concerning cheques payable and lodged to the credit of Higgins, Litchmore and McBean in the respective Bank accounts and drawn on the account of the J.I.S. Co.'s account at the New Kingston Branch of the Bank of Commerce (Ja.) Limited.

It seems unnecessary to deal specifically with each objection as it is of no moment. Hugh Richards gave evidence as to the payments made to the appellants Higgins, Litchmore, Evans and McBean, and they in turn admitted receiving the payments and the real bone of contention is whether the payments were for services lawfully rendered in their private capacities or were gratification for showing favour. Accordingly it is not essential here and now to consider whether in the light of the decision in Barker v. Wilson (supra) that:

> "For the purposes of s9 of the Bankers' Books Evidence Act 1879 'bankers' books' include a record of a customer's transactions and details

> "of cheques recorded by a bank on microfilm, and accordingly such microfilm may be used for the purpose of proving banking transactions in legal proceedings in accordance with the 1879..."

this Court ought to adhere to the stand on micro-films taken in R. v. Paulette Williams (supra).

Complaint was also made against the admission in evidence of the records of the interrogation of appellants McBean and Blake by Detective Wilks on the grounds (i) that the caution allegedly given was not recorded (ii) the documents were not signed by the witnesses (iii) they were taken with a view to arrest and prosecution and (iv) the record was not complete as it contained only such matters as the officer desired to record.

We would observe that there has been no serious challenge to the voluntariness of the answers given to the questioning by the investigating officer, and these were obviously made in the course of the investigations, and the fact that the appellants declined to sign, does not make the document any less a memorandum of their voluntary answers. It would be more accurate than the witnesses unaided recollection of the answers. However, the anxious concern of the appellants' counsel, apparently, was to the fact that certain entries in the cash book were referred to, in the interrogation and therefore, he contended, inadmissible evidence was thereby admitted. To us, it seems a storm in a teacup, having regard to the nature and conduct of the defence, that Hugh Richards gave direct evidence on the entries referred to, and that the answers given in the interrogation did not to any appreciable extent advance the case for the prosecution.

As a preliminary point, Mr. Rattray had submitted that the counts charging the appellants with breaches of the Corruption Prevention Act were defective in that in the "particulars of offence" the averment "in the exercise of his official function" was omitted. Mr. Andrade conceded that the counts were to that extent defective but asked that the Court exercise the power of amendment conferred by Section 302 of the Judicature (Resident Magistrates) Act, on the grounds that:

(i) There is sufficient evidence to prove the averment omitted.

(ii) The point was not raised at the trial

(iii) The amendment could be effected without injustice to the appellants - Section 303 of the Judicature (Resident Magistrates) Act

We deferred our decision on this question pending consideration of the fundamental question whether or not there was sufficient evidence to support the convictions.

As the other grounds of appeal involve consideration of the Resident Magistrate's findings, it is perhaps convenient and for easy reference to set out hereunder the findings as recorded:

> "The court carefully considered all the Evidence in this case. The crown's case was accepted. The case for the defence was rejected. The unsworn statements of all the accused are recorded verbatim. The Demeanour of oath witness was observed - discrepancies in evidence considered and the unsworn statements taken into account.
>
> The court regarded Richards as an Accomplice and duly warned itself. Richard's evidence was corroborated by the accused persons themselves and also by prosecution witnesses.
>
> The accused persons were found not guilty on counts 2, 3, 8, 19, 22 and 24 because these counts were not proved and on counts 4, 5, 6 and 7 because of the wording of those counts of the indictment.
>
> Court found that all five (5) accused persons and others conspired together to defraud the Ministry of Construction of money. That the four (4) accused persons who were employees of the Ministry of Construction corruptly received money as a motive or reward for showing favour to JAMCO and or Jamaica Industrial Supply Company Limited.
>
> The court found clear evidence that the conspiracy started soon after the time when Higgins returned to work at the Ministry of Construction late 1980 to early 1981. Higgins was ideally placed to mastermind the fraud perpetrated on the Ministry. Along with Blake and Richards, they formed a company or companies. The other accused McBean, Evans and Litchmore were aware of the purpose of the company and were prepared to assist for monetary rewards.
>
> The injection of funds into the Hire Fund Scheme made ideal pickings for those greedy men who systematically fed orders into "their company." This is evidenced by blank payment order vouchers drawn up for JAMCO with JAMCO Invoices as also signed payment vouchers and orders awaiting orders from the Ministry.
>
> It is abundantly clear that it was the purpose of the four accused employed to the Ministry to steer orders

> "for goods needed by the Ministry to their company. They knew that their company was a fraud itself. It could never be an Approved Supplier as it did not have the necessary facilities. It could only act as a middle man doing what the Ministry itself could do - buy goods from it's suppliers.
>
> Their intention from the inception of their company was to line their pockets by buying available goods on the open market and selling some back to the Ministry at exorbitant rates. This they did in fact on at least one instance they go greedy, that they bought and sold oil to the Ministry - sending it to the Montego Bay workshop, where they no doubt feel it would have been overlooked: the oil was not ordered by Montego Bay and was not then needed in Montego Bay.
>
> This court felt that on the clearest evidence the accused persons were guilty as charged on counts 1, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21 and 22. The Custodial Sentence was intended to be a deterrent to others who would think it easy to indulge in similar acts as the accused persons did."

Mr. Rattray argued the following ground based on papagraph 2 of the findings:-

> "That the evidenee of the witness Hugh Richards recognized by the learned Resident Magistrate to be the evidence of an accomplice was not corroborated by any independent evidence properly admitted at the trial and the learned Magistrate was wrong in law in finding that there was corroboration."

The passage on which this ground rested is typical of the Resident Magistrate's findings on important questions of law and contentious issues. Instead of specific findings of fact, there are sweeping generalities and questions of law are disposed of with pontifical statements and ultimate conclusions are reached without exposing for critical review, the logical steps leading to those conclusions. But the appeal is in effect from the judgment and, from what was stated in the findings he obviously accepted without reservations, the evidence adverse to the appellants and accordingly our task will be to say, in the end, whether the evidence supported the findings of guilt.

Now as regards this particular ground of appeal, it is true, as Mr. Rattray pointed out, that with respect to the substantive charges of corruption, on the vital issue as to the purpose for which payments were made and received by the appellants, they contended that such payments were

for services rendered in their private capacities and, therefore, could not be corroborative evidence on that issue. However, this finding (except perhaps to a certain extent in the case of Litchmore) whom Richards said it was agreed to pay him $300 per month for channelling orders, clearly does not rest on the evidence of Richards but upon the inference to be drawn from all the circumstances.

For evidence to be corroboration, it must be in a material particular but not necessary in every particular nor any particular, particular. Illustrative of this, is that in respect to Blake holding out his trading entities as approved suppliers or possessing the necessary criteria of an approved supplier, there is corroboration in the letters written by him to the Ministry and in particular, in regard to the warehousing facilities, the evidence of Detective Wilks.

As a prelude to his submissions that the evidence did not support the convictions for breaches of the Corruption Prevention Act, Mr. Rattray drew attention to the difference between the provisions in the English Act (1916) and the Jamaican Act. In the former, the Act expressly provides in Section 2 - that where in proceedings under the Act "it is proved that any money, gift, or other consideration has been paid or given or received by a person in the employment of Her Majesty or any Government Department or a public body by or from a person or agent of a person, ... the money, gift or consideration shall be deemed to have been paid or given and received corruptly as such inducement or reward as is mentioned in such Act unless the contrary is proved."

There is no similar statutory presumption in the Jamaican Act and in our view its absence means that the prosecution must tender evidence from which the reasonable inference may be drawn that there was a gratification corruptly received as an inducement or reward to show favour in the exercise of official function.

In this regard Mr. Rattray submitted that assuming that there were breaches of the Civil Service Regulations in accepting directorship in the Company this would not make them guilty of corruption or conspiracy.

Certain payments were for travelling expenses on legitimate business of the company.

Mr. Rattray over-simplifies the position. The issue is contested. Here are three senior civil servants in a department, all being on a board of seven or eight directors in a company formed with a view to trading with their department, and they, being the officers together who order, approve and authorise payments of goods purchased from their company; not only did they channel a considerable volume of business to the company, but in doing so, by-passed approved or accredited suppliers and purchased goods at prices considerably above regular suppliers, and even in one case, unwanted goods. On this evidence, the finding of showing favour is inescapable. On the question whether they did so for a gratification, although they were charged with specific amounts, the evidence of collateral benefits such as the right to sign at certain hotels and restaurants for food and drink, and the expectant benefit of being provided with a car as soon as the finances of the Company would permit, are not only relevant to showing favour, but support the inference that the amount paid for directors fees was but a cover up. Indeed, it was clearly in their interest, that the financial position of the company be expeditiously enhanced.

In our view, there was sufficient evidence in general to prove the essential elements for the offence of corruption in contravention of Section 4 of the Corruption Prevention Act. Certain submissions were made specifically to certain counts and those would be dealt with later.

Accordingly, it is enough to say that, whenever necessary, those counts of the indictment charging corruption in the exercise of the powers conferred by Section 302 will be amended to include the words "in the exercise of his official function", as in our opinion, no injustice would be caused thereby. [See R. v. Hubert Stewart (unreported) P.C. 36/81 delivered 28/7/82].

In support of the ground that "the totality of the evidence adduced against the accused does not in law establish the elements of

conspiracy ...." Mr. Rattray submitted that the evidence overall shows a legitimate business being carried on, and that from the several hundred items sold to the Department there were but three singled out for over-charging, viz, brake fluid, thinner and motor oil. In respect of the oil, he adverted to the fact that what appears to be a requisition number was on the invoice and the storekeeper of the Montego Bay Section was not called to refute the inference that the requisition came from that office. As to this fact, it was open to the Resident Magistrate to accept the evidence of Rupert Lewis, the Executive Engineer, that the oil could not be requisitioned without his being aware of it.

Mr. Rattray argued that with the exception of an order to purchase imported tyres which was never pursued, the three instances of overcharging as against the hundreds of bona fide transactions would indicate that there was no agreement to sell to the Department at exorbitant prices. This case, he maintained, could be put no higher than the civil servants without the permission of the Government becoming directors of a company supplying goods to their Department at a reasonable markup. They may have been in breach of Civil Service Regulations, but this was not a criminal offence. Blake was not, he said, a public servant and he could sell to the Government at any price without committing an offence. If there were one or two sales at exorbitant prices, this would not prove an agreement to sell at exorbitant prices. In respect of Evans, the evidence is that on one occasion certainly he voiced his objections to Government being over-charged. He drew a distinction between the instant case and R. v. Jacobs 30 Cr. App. 1 on the grounds that in the cited case the appellants were charged with conspiracy to contravene a statute which fixed control prices on certain goods. He pointed out that Hansard Taylor, a director of DEMS had signed vouchers approving of payments to J.A.M.C.O.

In reply, Mr. Andrade submitted that as to the agreement and the intent to defraud, those elements must be inferred from the totality of the evidence. The appellant civil servants acted in breach of Section 5(4) of

the Finance and Audit Act. They knew that Government in pursuit of economy did not deal with "middlemen". The three items of which evidence was given as to prices are but samples - "the tip of the iceberg". The inference to be drawn from the evidence is that the appellants agreed to defraud the Ministry by the means set out in the indictment.

Neither Mr. Rattray's approach to the three specific items to the effect that "one swallow does not make a summer" nor Mr. Andrade's "tip of the iceberg" can resolve the question raised by this ground. As regards Mr. Rattray's views, the fact that a company may be formed for legitimate business does not preclude illicit enterprises being in contemplation nor the fact that there were legitimate dealings preclude the achievement of illegal aims in other transactions. Nor can the absence relating to an averment, the positive proof of which is essential to conviction be likened to the scientific fact that the greater mass of an iceberg is below the surface of the sea. Both counsel however, are in agreement that 'dishonesty' is an essential element in a conspiracy to defraud.

In that regard we were referred to the following excerpt from the judgment in R. v. Harry Landy and others [1981] 72 Cr. App. Rep. at p. 247:

> "What the prosecution had to prove was a conspiracy to defraud which is an agreement dishonestly to do something which will or may cause loss or prejudice to another. The offence is one of dishonesty. This is the all important ingredient which must be stressed by the judge in his directions to the jury and must not be minimised in any way. There is always a danger that a jury may think that proof of an irregularity followed by loss is proof of dishonesty. The dishonesty to be proved must be in the minds and intentions of the defendants. It is to their states of mind that the jury must direct their attention. What the reasonable man or the jurors themselves would have believed or intended in the circumstances in which the defendants found themselves is not what the jury have to decide; but what a reasonable man or they themselves would have believed or intended in similar circumstances may help them to decide what in fact individual defendants believed or intended. An assertion by a defendant that throughout a transaction he acted honestly does not have to be accepted but has to be weighed like any other piece of evidence. If that was the defendant's state of mind, or may have been, he is entitled to be acquitted. But if the jury, applying their own notions of what is honest and what is not, conclude that he could not have believed that he was acting honestly, then the element of dishonesty will have been established."

We note with interest that the appeal in Landy's case was allowed on the grounds that the summing up was defective. As in Landy's case, the earlier case of Scott v. Metropolitan Police Commissioner [1974] 60 Cr. App. R. (1975) 124 was cited in argument. In that case the point of law certified for consideration of the House of Lords read: (p. 125)

> "Whether, on a charge of conspiracy to defraud, the Crown must establish an agreement to deprive the owners of their property by deception; or whether it is sufficient to approve an agreement to prejudice the rights of another or others without lawful justification and in circumstances of dishonesty..."

In the course of argument Mr. Blom-Cooper, Q.C., counsel for appellant referred to the following oft cited dicta of Buckley J in the London and Globe Finance Corporation Ltd. [1903] 1 Ch. 732:

> "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes it to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."

and said that:

> "... while not submitting that an intent to defraud necessarily includes an intent to deceive, nevertheless submitted that a man could not be defrauded unless he was deceived. Buckley J's definition was, he said, exhaustive..."

To this argument after an industrious review of the dicta in a number of cases Viscount Dilhorne said: (p.129)

> "One must not confuse the object of a conspiracy with the means by which it is intended to be carried out. In the light of the cases to which I have referred, I have come to the conclusion that Mr. Blom-Cooper's main contention must be rejected. I have not the temerity to attempt an exhaustive definition of the meaning of "defraud". .....
> .....
> If, as I think, and as the Criminal Law Revision Committee appears to have thought, "fraudulently" means "dishonestly" then to "defraud" ordinarily means in my opinion to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud, be entitled."

Lord Diplock after referring to the advantage of having read Lord Dilhorne's speech and his agreement with it, drew a distinction between

those cases where the intended victim is a private person and where the intended victim is a person performing public duties thus: (p. 131)

> "The authorities that he (Viscount Dilhorne) cites and others cited in the speeches in this House in the contemporaneous appeal in Withers and others v. D.P.P., ante, p. 75, in my view, established the following propositions.
>
> (1) .....
>
> (2) Where the intended victim of a "conspiracy to defraud" is a private individual, the purpose of the conspirators must be to cause the victim economic loss by depriving him of some property or right, corporeal or incorporeal, to which he is or would or might become entitled. The intended means by which the purpose is to be achieved must be dishonest. They need not involve fraudulent misrepresentation such as is needed to constitute the civil tort of deceit. Dishonesty of any kind is enough.
>
> (3) Where the intended victim of a "conspiracy to defraud" is a person performing public duties as distinct from a private individual, it is sufficient if the purpose is to cause him to act contrary to his public duty, and the intended means of achieving this purpose are dishonest. The purpose need not involve causing economic loss to anyone."

The primary question here was whether the evidence was sufficient to establish an agreement by the appellants to dishonestly deprive the Government of something or something to which the Government would have been entitled but for the perpetration of fraud. To determine that question the cumulative cogency of the evidence rather than a consideration in isolation of various segments would seem the appropriate approach. Breaches of Civil Service Rules or of financial regulations though not conclusive of any criminal offence, would be relevant in showing that they deliberately declined to declare their interest in the companies so that they could surreptitiously remain in control of the placing of orders with, and approval of the payments, to the company in furtherance of the agreement alleged. But was there established an agreement as alleged?

From the evidence it is clear that J.A.M.C.O. was created to operate as a "middleman" buying and selling at a profit. The promoters of the

Company at its formation made three officers of the D.E.M.S. foundation directors. These officers were in a position to bypass approved or accredited suppliers and contrary to the policy of Government not to deal with middlemen to channel orders to Blake's Company which was to the officers' knowledge not an approved supplier and to purchase goods at prices considerably above those obtainable from approved suppliers. This was the inference to be drawn from what actually took place. Hansard Taylor who approved payments on certain vouchers said that were he aware that J.A.M.C.O. was not an approved supplier he would not have so signed and that in 1981 it was not permissible to purchase supplies from suppliers not on the approved list. While from Permanent Secretary Dunkley's evidence where supplies were not available from approved suppliers and the need was urgent, it was permissible to purchase goods from other than approved suppliers, it was not suggested that the contractors or approved suppliers of oil, brake fluid or thinner were out of stock during the relevant period. Indeed the evidence is to the contrary; those items were purchased from approved suppliers and resold to the Ministry.

In Reg. v. De Kromme (1892) XVII Cox 492. The headnote reads:

> "A servant who, in order to make a profit for himself, sells his master's goods at less than their proper market value, thereby defrauds his master of the sum which represents the difference between the value of the goods and the price at which the servant has sold them. Where, therefore, a person was indicted for soliciting a servant to conspire to cheat and defraud his master, and it was proved that such person had offered a bribe to the servant as an inducement to him to sell certain goods of his master at less than their value:-
>
> Held, that he might properly be convicted of such conspiracy."

In a judgment of concise clarity Coleridge, C.J. said:

> "I have no doubt in this case. The prisoner approached the foreman of a merchant, and attempted to obtain goods from him at a price less than that at which they could have been sold at a profit. If the foreman had sold the goods at such a price his master would have been defrauded."

In our view the reasoning in that case is applicable to the instant case. Here the appellant Blake induced the appellant civil servants to become

foundation directors of his 'Companies' for substantial financial benefits including participation in the profits and in order that they would use their offices not only to channel orders for the purchase of goods by the Department from the companies, but at prices considerably above those obtainable from approved suppliers or contractors. In so doing, the Government suffered actual economic loss to the extent of the amounts so overcharged.

The fact that Hansard Taylor and other officers had approved payments on certain vouchers, would not avail the appellants in the light of Hansard Taylor's evidence to the effect that he signed the payment vouchers in favour of J.A.M.C.O. because he was led to believe that the company so named was an approved supplier. In any event, in the case of the three questioned items, Higgins was the officer authorising payments.

Submissions were also made on behalf of certain appellants in respect of specific counts.

In relation to Count 1, it was submitted that the appellant Evans having voiced his objections to any overcharging, he was clearly not in any agreement to defraud the Government by raising, fixing or maintaining prices of goods purchased by the Ministry from Blake's Companies. Now it is common experience that difference often lie between what is said and what is done and accordingly, where the act conflicts with the spoken word as to intent or any state of mind, it is open to the tribunal of fact to prefer the inference to be drawn from the deed than the expressed intent or state of mind. In the instant case, although Evans expressed disapproval of overcharging, he continued to be a member of the team, so to speak, and co-signed cheques covering payments for goods supplied by a company that was not an approved supplier and at prices above the prices obtainable for such goods as oil, thinner and brake fluid from approved suppliers and contractors and of these facts the inference of knowledge on his part could reasonably be drawn. Although he was the "least of the apostles" the learned Resident Magistrate made no distinction and we see no good reason to do so now.

Further, it was submitted that Evans was the only officer who was convicted on counts in which it was alleged that the money received by him were loans.

The counts respectively were for receiving $1,750 on 26th June, 1981 and $300 on 1st September, 1981 from the Jamaica Supply Company.

Evidence was given by Richards that the loans of $1,750 and $300 were not repaid. As regards the $1,750, Evans in his statement from the dock, said the $1,750 was a repayment of a loan that he had personally made to Blake.

It is not being suggested that a loan could not be a gratification: Indeed the definition in the Act is sufficiently wide to cover such a transaction. What we understood as being put forward, is the inconsistency in the verdicts.

Of the ten counts of indictment on which verdicts of not guilty were entered, six were at the close of the prosecution's case on the grounds that these "were not proved" and four at the end of the case "because of the wording of those counts" in the indictment.

From these terse statements, it would be difficult to fathom the reasons for the dismissal of the first six counts. Four of these counts were/apparently based on allegations that the payments were under the head of loans from the Company. However, on examination of the evidence of Hugh Richards it was seen that two of these counts relating to Higgins were in respect of payments of $18,000 and $3,000 made on the 1st April and 1st July, 1981 respectively, but Richards admitted that they were not paid to Higgins but to a third party. One count was to Evans for a payment of $3,000 to be lodged to a credit union so that Evans would be qualified for a loan three times that amount to enable him to purchase a car he Richards was selling, and was made by Richards' personal cheque and one count was against McBean for receiving $9,800 on 21st October, 1981 but Richards admitted that McBean had sometime before made a loan to J.A.M.C.O. to that amount. Accordingly, the evidence on these counts is distinguishable and, therefore, there is no real inconsistency in the verdicts.

With respect to Litchmore, it was submitted that in respect to counts charging Litchmore for receiving $300 on 30th April, 1981, no cheque in proof of payment was tendered and in respect of the counts charging a payment on 29th May, 1981 the cheque dated 25th September, 1981 was irrelevant and in relation to count charging him with receiving a payment on 26th June, 1981 there was no corresponding entry in the Company's Ledger. Instead, there were two entries in May 1981.

There is no record in the Company's Books of any payment made on 29th May, 1981 and there is no evidential connection between that date and a cheque in his favour dated 25th September, 1981 and accordingly the conviction on that count (Count 14) goes. As regards the other payments, the evidence rests on Hugh Richards' evidence and Litchmore has not denied receiving payments. The learned Resident Magistrate accepted Richards' evidence and as he was entitled to do, held that the payments were for channelling orders to J.A.M.C.O.

For the reasons set out herein we hold that save and except Count 14 - charging Litchmore for receiving gratuity on the 29th May, 1981, there is sufficient evidence to support the verdicts entered by the learned Resident Magistrate on all the other counts. For these reasons and subject to that exception the appeals against convictions are dismissed and the convictions affirmed.

On the 31st July, 1987 we entertained an appeal against sentences. In praying that the custodial sentences be set aside, Mr. Rattray adverted to the following:-

(i) The appellants had no previous convictions.

(ii) That notwithstanding the terms and tenor of the indictment, the prosecution had tendered positive proof of overcharging the Ministry with respect to three transactions.

(iii) The Civil Service appellants will in all probability be dismissed from the service if that has not already been done.

In allowing the appeals against sentences, in addition to these considerations, we are of the view that the Resident Magistrate in imposing similar sentences on all the appellants did not consider the role by each appellant in the general scheme nor are we able to say from his general condemnation that he considered or accurately assessed on the basis of the evidence the extent to which the Ministry had actually been defrauded.

Accordingly, we allowed the appeals against sentences and substituted the following:-

On Count 1 - each appellant fined $4,000 and in default three (3) months imprisonment with hard labour.

Higgins

Counts 10 & 15 - On each count fined $1,000 and in default twelve (12) months imprisonment with hard labour.

Litchmore

Counts 12 & 17 - On each count fined $500 and in default six (6) months imprisonment with hard labour

McBean

Counts 11, 16 & 21 - On each count fined $500 and in default six (6) months imprisonment with hard labour.

Evans

Counts 9, 13, 18, 20 & 23 - The appellant was admonished and discharged.