JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO. 28/2007

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag)

MELANIE TAPPER
WINSTON MCKENZIE v. R

Dennis Morrison, Q.C., Lloyd McFarlane and Mrs. Carolyn C. Reid-Cameron instructed by Carolyn C. Reid & Company, for Tapper.

Lord Anthony Gifford Q.C. and Miss Ayisha Robb instructed by Rattray, Patterson Rattray for McKenzie.

Gayle Nelson (fiat) and Mrs. Karen Seymour-Johnson, Crown Counsel for the Crown.

March 31, April 1, 2,3,4,7,8,9, 2008 and February 27, 2009

SMITH, J.A.:

The appellants, Winston McKenzie and Melanie Tapper were tried in the Resident Magistrate's Court at Half Way Tree in the parish of St. Andrew by Her Honour Miss Jennifer Straw (as she then was) on an indictment containing thirteen (13) counts. The trial began on January 25, 2000 and ended May 29, 2003. Counts 1, 2, 3, 4, 5, 7 and 8 charged McKenzie with fraudulently causing money to be paid out contrary to section 35(1) of the Larceny Act.

Count 6 charged McKenzie with obtaining money by false pretences, contrary to section 35 (1) of the Larceny Act.

Count 9 charged McKenzie and Tapper jointly with conspiracy to commit forgery.

Count 10 charged both appellants with conspiracy to defraud.

Count 11 charged Tapper alone with fraudulently causing money to be paid out. Counts 12 and 13 charged the appellant McKenzie and his wife with conspiring together and with another to defraud.

It was alleged that these offences were committed on various days between January 17, 1994 and June 28, 1995. The appellant, McKenzie was convicted on counts 1 to 8 and 12 and 13. He was found not guilty on counts 9 and 10. The appellant Tapper was acquitted of the offences charged in counts 9 and 10. She was convicted on count 11. Mrs. Elaine McKenzie was acquitted. The appellant Winston McKenzie was sentenced to imprisonment for 18 months at hard labour on each count. The Resident Magistrate ordered that the sentences should run concurrently. Tapper was also sentenced to 18 months imprisonment at hard labour). Many witnesses were called on behalf of the prosecution. Their evidence covers over 600 pages of transcript. Eighty three (83) documents were received in evidence.

The virtual complainants are Mr. Bentley Rose, Benros Ltd. (Benros) and Marco Finance Corporation Ltd. (Marco). Mr. Rose is a businessman and the Managing Director of Benros and Marco. Mr. Rose and the appellant McKenzie were directors of both companies. The former was

the majority shareholder in both companies. Mr. McKenzie was a banker and was in 1975, when he met Mr. Rose, the manager of the Maxfield Avenue branch of the then Workers Bank. Mr. McKenzie became one of Mr. Rose's bankers, his friend and business advisor in whom he reposed trust. Mr. Rose was semi-literate.

Mrs. Tapper in 1994 was the Manager at the New Kingston branch of the Canadian Imperial Bank of Commerce (C.I.B.C). Mr. Rose was introduced to her by Mr. McKenzie who apparently was a close friend of Mrs. Tapper. Sometime in 1995, Mrs. Tapper left C.I.B.C. and became manager of Trafalgar Commercial Bank (T.C.B.). It was on the suggestion of the appellant, Mr. McKenzie, that Mr. Rose opened accounts at the banks referred to. The mandate of the Worker's Bank, Tower Street branch required all cheques over $5,000.00 to be signed by two persons. The mandate at the Spanish Town branch of the Worker's Bank required all cheques of any amount to be signed by two persons. The mandate at Eagle Commercial Bank (now T.C.B) required that all cheques of $10,000 be signed by two persons. Mr. Rose testified that he and the appellant, Mr. McKenzie attended at the New Kingston branch of the C.I.B.C. on the day that the account in the name of Benros was opened there. He swore that in the presence of the appellant, Mr. McKenzie, he instructed the manager, the appellant, Mrs. Tapper that cheques drawn on the account for over $20,000.00 should be signed by both Mr. McKenzie and

himself. They were the only signatories to that account. Mr. Rose further testified that Mrs. Tapper had him sign a number of blank documents including the signature card. Mr. McKenzie also signed the documents after Mr. Rose had signed. Mr. Rose then gave Mrs. Tapper the money to open the account and left both appellants at the bank. The burden of the allegations is that on various days Mr. McKenzie with intent to defraud caused the said banks to pay out sums ranging from $34,718.07 to $1M for which cheques were drawn against the accounts of the companies. The allegation against Mrs. Tapper is that she, with intent to defraud caused T.C.B to pay out $2,000,000.00 out of the account of Mr. Rose.

At the end of the prosecution's case, no case submissions made on behalf of the appellants were rejected by the learned Resident Magistrate. Immediately after ruling that there was a case to answer on all counts, the learned magistrate directed, **suo motu**, that counts 1,2,3,4, 5 and 7 be amended to insert the words "falsely pretending that it was a legitimate transaction authorized by the directors of Benros Company Ltd." in substitution for the false pretence that was averred in the particulars of each count. Thus for example, the particulars of offence in respect of count 1 which originally read:

> "Winston McKenzie on the 17th day of January, 1994 in the parish of Kingston with intent to defraud, caused Workers Bank, Tower Street branch to pay out $157,266.64 against the account of Benros Company Limited by virtue of Workers Bank cheque #006885 dated the 14th

> January, 1994 payable to the Collector of Customs in the sum of $157,266.64 by falsely pretending that Benros Company Limited was indebted to the Collector of Customs (my emphasis).

were amended to delete the underlined words and to substituted therefor the words:

> "falsely pretending that it was a legitimate transaction authorized by the directors of Benros Company Limited."

The appellant McKenzie was repleaded on the amended counts and when called to state his defence he elected to say nothing and did not call any witness. The appellant, Tapper at first chose to do likewise, but subsequently sought to and was permitted to re-open her defence. She did not give evidence but called four (4) witnesses in her defence.

The Order for Indictment

Ground 6 (McKenzie) Ground 7 (Tapper)

In regards to these grounds counsel for both appellants contend that the order for indictment not having been properly endorsed or signed by the learned Resident Magistrate renders the trial a nullity and the verdicts should be quashed and sentences set aside. Reference was made to section 272 of the Judicature (Resident Magistrates) Act and to ***R v Monica Stewart*** (1971) 17 W.I.R 381 among other cases. Page 30 of the record shows that the learned magistrate granted an order for an indictment containing 13 counts. However, that order was not endorsed

on any of the 6 informations included in the record. Indeed the endorsements on two of these informations, which are not consistent with the order granted by the magistrates, were not signed.

Mr. Nelson for the Crown told the Court that he saw the Information on which the order made by the magistrate was endorsed. The learned magistrate stated in an affidavit that the order was endorsed on an Information and signed. Shortly after the Court had reserved its judgment Information No. 13612/96 on which the order was endorsed and signed was located and brought to our attention. The order is consistent with the magistrate's note at p.30 of the record. The failure of the Clerk of the Courts to include this Information in the record, resulted in the unnecessary submissions by counsel and the waste of judicial time.

The Appeal of Winston McKenzie

As stated before, the appellant McKenzie was convicted on counts 1,2,3,4,5,6 7, 12 and 13. Counsel for the appellant argued the following Supplemental Grounds of Appeal:

> "1. That the learned Resident Magistrate erred in law in failing to uphold the submission of no case to answer made on the Appellant's behalf at the close of the case for the Prosecution;
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> 2. The learned Resident Magistrate erred in law by amending counts 1,2,3,4,5 and 7 of the Indictment on February 11, 2003, being three years after the trial commenced, on her own volition to the effect that the nature and substance of the offences for which the appellant was convicted changed entirely after the close of the case for the prosecution and the ruling on

the no case submission in order to remedy the loopholes and weaknesses in the prosecution's case;

3. The learned Resident Magistrate erred in finding in respect of counts 12 and 13 of the Indictment that the evidence adduced by the prosecution established on the required standard of proof being beyond a reasonable doubt, that there was a person or persons unknown in Workers Bank who conspired with the Appellant without attributing who those persons' are who conspired with the appellant.

4. If the appeal is allowed on some but not all of the convictions it will be submitted that the sentence of eighteen month's imprisonment passed on the Appellant should be reviewed and reduced;

5. Further or in the alternative an immediate sentence of imprisonment upon the appellant, to take effect after the passage of nearly five years from the date of conviction, is not required in the interests of justice."

Ground 1 – The Magistrate's failure to uphold no-case submissions

Counts 1, 2, 3, 4,5, and 7 were dealt with together by counsel for the appellant. Count 6 was given separate consideration.

Counts 1, 2,3, 4, 5 and 7

These counts concern the appellant Winston McKenzie alone. They relate to various cheques signed by the appellant McKenzie and drawn on the accounts of Benros Company Ltd. at Workers Bank and C.I.B.C.

The allegations in respect of counts 1,2,3 and 4 were that the appellant with intent to defraud caused the Tower Street branch of the Workers Bank on various days to pay out the various sums from the account of Benros for which the cheques were drawn, by falsely

pretending that Benros was indebted to the payees. The allegations in counts 5 and 7 were similar to those above but related to the account at C.I.B.C.

The contention of counsel for the appellant is that, in relation to all these counts, the prosecution had failed to prove that the appellant had made a representation that Benros was so indebted and that such representation was false.

In relation to count 1, the relevant cheque is No. 006885 dated 14 January, 1994, drawn on Benros account at Workers Bank in the sum of $157,266.64 payable to the Collector of Customs. This cheque was tendered and admitted in evidence as exhibit 21. It carries the sole signature of the appellant, McKenzie. It was negotiated on the 17th January, 1994. Mr. Rose testified that he transacted no business with the Collector of Customs in January, 1994; neither did Benros. In fact, none of his companies had any business with the Collector of Customs in January, 1994, he asserted. He knew nothing about this cheque. The account in the name of Benros at the Tower Street branch of Workers Bank, was opened on the 11th September,1991. The "agreement" as to how the account should be operated was signed by the appellant, Mr. McKenzie and Mr. Rose. Three documents were involved – the signature card (the mandate) the history card and the corporate resolution. According to Mr. Rose he signed the cards in blank. The agreement reached was that

all cheques over $5,000.00 must have two signatures – the signatures of Mr. McKenzie and Mr. Rose. Mr. Rose stated that he also signed a debit memo for compulsory saving. This was done on suggestion of Mr. McKenzie. This document was also blank when he signed it.

In cross-examination he said that he knew nothing about the cheque (exhibit 21). The learned Resident Magistrate after referring to the various cheques in relation to the several counts said:

> "Mr. Rose gave evidence concerning these cheques. The court finds Mr. Rose to be a credible witness. It is quite clear to this court that between February, 1995 and June 1995, Mr. Rose experienced increasing problems with the accused Winston McKenzie as a director in Benros Company and as a signatory to Benros account both at Worker's Bank and C.I.B.C. There were issues of spoilt cheques which were later found to have been negotiated; cheques with only one signature which were negotiated as well as cheques used for questionable transactions by Mr. Mckenzie."

The learned magistrate found that the cheque did not represent a legitimate transaction authorized by the directors of Benros. She found inferentially, that the cheque was used for McKenzie's personal use.

In relation to count 2 the relevant cheque bears the number 000014 and is dated February 3, 1994. It is drawn on the Benros account at the Workers Bank Tower Street for the amount of $132,257.00 payable to National Housing Corporation Ltd. It has the sole signature of the appellant, Mr. McKenzie and was admitted in evidence as exhibit 22.

Mr. Rose testified that he transacted no business with the National Housing Corporation Ltd. (NHC) at any time, neither did Benros. He denied that this cheque was drawn with his authority. Miss Pamela Smith gave evidence that the cheque was negotiated. The court below accepted the above evidence in relation to cheque No. 000014 and found that it was used by the appellant, McKenzie for his own personal business and without Rose's knowledge. Count 3 concerns cheque No. 000034 dated April 5, 1994, drawn on the Benros account at the Workers Bank in the sum of $133, 382.00 payable to National Housing Corporation Ltd.) It also has the sole signature of the appellant, Winston McKenzie.

It was admitted in evidence as exhibit 26. Miss Pamela Smith testified that this cheque was negotiated and the amount thereon paid out to the payee. Here also Mr. Rose gave evidence that neither he nor Benros conducted any business with the NHC.

On the basis of the foregoing, the magistrate found that the appellant, McKenzie negotiated the cheque "for business not connected to Rose or Benros Co. Ltd. and unknown to Rose and thus without the authority of the Directors of Benros Company."

Count 4 concerns cheque No. 008168 dated January 31, 1995 drawn on Benros' account at Workers Bank in the sum of $43,000.00 payable to Jamaica National Building Society. This cheque also carries the sole signature of Mr. McKenzie – exhibit 23. Mr. Rose testified that

neither he nor any of his companies had any business with Jamaica National Building Society. Mr. Lloyd Ramdeen, a bank manager of RBTT Jamaica Limited stated that exhibit 23 was lodged at C.I.B.C. and that it was used to purchase a manager's cheque at C.I.B.C. Mr. Uken Campbell, the manager of JNBS testified that the C.I.B.C. manager's cheque went to a mortgage account of one Mr. Winston McKenzie. The magistrate accepted the evidence of these witnesses and found that "exhibit 23 was drawn to benefit an account that the accused Winston McKenzie had at JNBS, New Kingston". She found that this was done without the knowledge and authority of Mr. Rose.

Count 5 relates to cheque No. 01262 (exhibit 7) payable to Gardens of Arcadia/Strata Plan in the sum of $34,718.07. This cheque was used to pay the maintenance and insurance charges for Apartment C 21, Gardens of Arcadia. This cheque was drawn on Benros' account at C.I.B.C. This cheque was signed by McKenzie alone. From Mr. Lloyd Randeem's evidence the magistrate concluded that this cheque was negotiated.

Count 7 concerns C.I.B.C cheque No. 01278 dated April 13, 1995 for $100,000.00 payable to Sharon Williams – exhibit 6. It was encashed on April 18, 1995. Mr. Rose testified that Miss Sharon Williams was one of McKenzie's girlfriends. She had visited his office with McKenzie on several occasions. Mr. Rose referred to a letter which he sent to Mr. McKenzie on

June14, 1995. This letter which was signed by Mr. Rose as the managing director of Benros reads:

> "Dear Mr. McKenzie:
> Further in the matters surrounding your misappropriation of funds relative to the captioned company, we list below a schedule of cheques and other negotiated instruments for your comments in the column provided. (see original of C.I.B.C. instruments attached)."

A long list of cheques with the details of each cheque was attached. A column was provided for "Remarks." This letter was admitted in evidence as exhibit 4.

Mr. Rose testified that the appellant wrote in the remarks column for exhibit 6 the words "cash for office" (see page 4 of exhibit 4). Mr. Rose swore that Sharon Williams brought no cash to the shop after the 14th April, 1995, when he saw and spoke with Mr. McKenzie. He did not see McKenzie for ten days since he saw him on the 14th April, 1995. Mr. McKenzie then told him that he was going abroad on business. Mr. Rose further testified that Mr. McKenzie brought no cash to the office in respect of exhibit 6.

Mr. Rose denied the suggestion by counsel for Mr. McKenzie that exhibit 6 was made payable to Sharon Williams for her to obtain $100,000.00 for the business. The learned magistrate accepted Mr. Rose's evidence that the proceeds of exhibit 6 were not used for the business.

The payee, Miss Sharon Williams gave evidence for the prosecution. She testified that at the material time she was working at the Tower Street branch of the Workers Bank. She was the secretary of the appellant Mr. McKenzie who was the Assistant Manager. She identified exhibit 6 as a photocopy of a cheque made payable to her. She recognized Mr. McKenzie's signature as the person who signed the cheque. She also recognized the signature on the back of the cheque. She testified that Mr. McKenzie had signed the cheque and given it to her in blank. She said that Mr. McKenzie told her that Mr. Rose "would come to collect the amount later." However, Mr. McKenzie, she said, later called her to say that Mr. Rose could not make it. He asked her to fill in the amount of $100,000.00 and to make it payable to herself and to cash it. As the cheque was not drawn on Workers Bank, she had to get it approved by C.I.B.C. Having had C.I.B.C's approval, she was able to encash the cheque. She gave the cash to Mr. McKenzie later that evening.

Mr. Ramdeen testified that exhibit 6 passed through C.I.B.C. clearing system and that the bank's stamp on the front of the cheque indicated it was paid. The magistrate found that neither Benros nor Mr. Rose benefited from exhibit 6. She found that it was negotiated for Mr. McKenzie's own personal use without Mr. Rose's approval.

The false pretence averred in each of these counts (counts 1,2, 3,4,5, and 7) is that Benros was indebted to the payee named in each

cheque. The common thread in all these counts is that neither Mr. Rose nor Benros did any business with these payees.

Was the learned magistrate right in concluding that the evidence adduced by the prosecution was sufficient to establish a prima facie case in respect of each count in question as originally charged? It was incumbent on the prosecution to prove:

(i) That the appellant made a false pretence to the bank in question.

(ii) That as a consequence of the false pretence the bank paid out the money for which the cheque was drawn.

(iii) That the false pretence was made with intent to defraud.

(iv) That the appellant knew that the pretence was false.

The false pretence alleged in the un-amended counts was that Benros was indebted to the payees in whose favour the cheques were drawn. The contention of the prosecution is that by drawing the cheques in each case, the appellant was making a representation to the Bank that Benros was indebted to the payees which representation the prosecution claim was false. I am afraid I cannot agree with this contention. The giving of the cheque to the payee amounts to a representation to the payee that the drawer has authority to draw on the bank for the amount and that the cheque is a good and valid order for the amount–see ***R v Hazelton***, L.R. 2 CCR 134. The cheque is an order to the bank to pay to the order of the

payee the sum of money stated therein. It does not amount to a representation to the bank that the drawer is indebted to the payee for the former may be making a gift to the latter or he may be making the payment on behalf of someone else.

Further the prosecution must prove that the false pretence caused the bank to honour the cheque. I have examined the transcript and have not been able to find any evidence to the effect that the bank in paying out the money relied on the alleged representation. Neither have I seen any evidence that the alleged false pretence had any causal connection with the paying out of the money. Mr. Rose did not say in his evidence that any representation was made by the appellant to the bank. There is no evidence of anyone from the bank that the appellant made any representation to the bank. Thus, the prosecution had failed to prove an essential ingredient of the offence charged in each of the counts involved. The learned Resident Magistrate, in my view, erred in holding that there was a case to answer in respect of these counts.

I will return to these counts later to consider the magistrate's order that the counts be amended.

Count 6

The offence charged in this count is obtaining money by false pretences. The allegations are that Mr. McKenzie obtained $1,000,000.00 by falsely pretending that he was entitled to the proceeds of a cheque

drawn on the account of Benros at the C.I.B.C. The cheque involved is No.01242 dated February 10, 1995 – exhibit 5. This cheque was made payable to Mr. McKenzie and carried his signature alone. This cheque (exhibit 5) was listed on exhibit 4. Mr. McKenzie made no comment concerning this cheque in the column provided for comments on exhibit 4. Mr. Rose testified that this cheque was not used to obtain cash for his business. The learned magistrate found that proceeds of this cheque were used by McKenzie for his own benefit without Mr. Rose's approval.

Was there a pretence? The pretence may be by conduct. It seems to me that if a person presents a cheque to a bank whether by himself or his agent and that cheque is signed by and payable to himself, then that person is representing to the bank that he is entitled to proceeds of the cheque. The clear inference from the facts found by the magistrate is that McKenzie presented exhibit 5 to the bank. The magistrate found that he was not entitled to the proceeds of exhibit 5. Thus the representation to the bank was false. According to Mr. Ramdeen when a cheque is presented to a banker, the banker will examine the cheque in respect of its date, words, figures and signature. To do that, the banker makes reference to a signature card to ensure that the signature is the same. The banker will check the identification of the payee if the cheque is for cash. He will check the account number and branch number on the

cheque. Then the authorizing officer will initial the instrument. If all the requirements are satisfied the banker will then pay out.

In my judgment there was sufficient evidence to establish a prima facie case that the appellant McKenzie with intent to defraud obtained $1,000,000.00 by falsely pretending that he was entitled to the proceeds of exhibit 5.

The appellant when called upon elected to say nothing. He called no witness. The magistrate was entitled to conclude that he was guilty as charged.

Count 8

The particulars of offence in this count are that Winston McKenzie on the 7th day of April, 1995 in the parish of Kingston with intent to defraud, caused Workers Bank, Tower Street Branch to pay out $100,000.00 against the account of Benros Company Ltd by virtue of Workers Bank cheque #000032 dated 6th day of April ,1995, payable to Desda Kerr in the sum of $100,000.00 by falsely pretending that Benros Company Ltd. was indebted to Desda Kerr.

The evidence accepted by the magistrate, is that this cheque - exhibit 8, was drawn on Benros' Worker Bank account. The magistrate also found that the sum of $100,000.00 for which the cheque was drawn, was paid directly into a loan account at C.I.B.C. for one Desda Kerr. This loan account related to a mortgage for Apartment C 21, Gardens of

Arcadia which was jointly owned by Desda Kerr and Melanie Tapper. This cheque, exhibit 8 at first bore only the signature of the appellant Winston McKenzie. When the cheque was presented at Workers Bank, Tower Street, Mr. Rose was contacted with a view to his adding his signature. Mr. Rose testified that it was one Miss Judith Aarons who contacted him. Miss Aarons said she could not remember and in fact, later denied this. The magistrate however accepted the evidence of Mr. Rose that it was Miss Aarons who instructed him to add his signature. Mr. Rose testified that after he was called about the cheque he asked Mr. McKenzie about it. He stated that Mr. McKenzie told him that he (McKenzie) was getting some goods from Desda Kerr. Mr. Rose testified that no such goods were received. The magistrate found Mr. Rose to be a credible witness in this regard. She rejected the evidence of Miss Desda Kerr that when she received the cheque there were two signatures thereon and that it was lodged in that form. The learned magistrate found on the evidence before her that the appellant McKenzie drew the cheque for his own personal business. And that he subsequently tricked Mr. Rose into co-signing it with a view to having the cheque negotiated by representing to the banker that Benros Company Limited was indebted to Desda Kerr.

It seems to me that the evidence does not establish that the pretence alleged operated on the banker's mind. What is established is that McKenzie falsely represented to Mr. Rose that the proceeds of the

cheque were needed to pay Desda Kerr for goods to be supplied by her. This false pretence induced Mr. Rose to sign exhibit 8. It was Mr. Rose's co-signing of exhibit 8 which caused the banker to accept and negotiate the cheque. It does not appear that the cheque was honoured by the bank because of the alleged representation that Benros was indebted to Miss Desda Kerr.

In my view there was not sufficient evidence to warrant the magistrate calling on the appellant to answer this count.

Ground 2

In this ground Lord Gifford Q.C. for the appellant McKenzie complained that the learned judge erred in amending counts 1,2, 3, 4, 5 and 7 after ruling that there was a case to answer in respect of each count. Alternatively, learned Queen's Counsel contended that having made the amendments the magistrate should have acceded to counsel's request to recall the witnesses involved for further cross-examination.

As stated before, the learned magistrate having ruled on the no-case submissions, told counsel that she proposed to amend the counts in question by inserting in each count after the words "falsely pretending that" the words: "it was a legitimate transaction authorised by the Director of Benros Company Ltd." in place of the words which were there before. She invited the comments of counsel on both sides. Mr. Scott, counsel for

the appellant McKenzie, strongly opposed the proposed amendments. Mr. Scott argued that such amendments would be unfairly prejudicial to the appellant; that the amendments would change the character of the offences charged in those counts and that the late amendments would result in an unfair advantage to the prosecution and deprive the appellant of a fair trial. Mr. Scott also contended that the cross-examination of the witnesses was "sculptured to meet the specific charges". He submitted that if the counts had been in the proposed amended form he would have confronted the witnesses with certain documents and would have requested additional discovery of documents.

The learned magistrate held that the amendments as suggested were not unfair or prejudicial since Mr. Rose's evidence was that the 'transactions" were not legitimate in that they were not authorised by him. Following on the amendments, Mr. Scott for the appellant applied to recall the following witnesses - Mr. Bentley Rose, Mrs. Cynthia Rose, Miss Allison Rattray, Miss Denise Caine, Miss Simone Barrett and Mr. Warren Robinson. These witnesses, he said, were not cross-examined "within the tone and tenor of (sic) characteristics of the amendments". His application was refused by the magistrate.

On appeal, Lord Gifford Q.C. contended that the reasons which prompted the amendment (i.e. that the amended counts would better

correspond with the evidence given than the original counts) would have been apparent, at the least, at the close of Bentley Rose's evidence. At that stage, he submitted, the amendments would have been made without undue prejudice and cross-examination of all witnesses could have taken account of the allegations in the amended counts. As it was, he said, the appellant was forced after three (3) years of his trial, eight or nine years after the dates of the alleged offences to meet a new case. Moreover, he continued, it would have appeared to the appellant that it was the judge who prompted the amendment in order to remedy a defect in the prosecution case after she had ruled that there was a case to answer. He submitted that there was a clear appearance of injustice, as well as the likelihood of actual injustice.

Learned Queen's Counsel in his written submissions referred to section 6 of the Indictment Act, ***R v Errington*** (1922) 16 CR. App. R. 148 at 149; ***R v Hughes*** (1927) 20 Cr. App. R4; ***R v Radley*** (1974) 58 Cr. App. R 394; ***R v Simpson*** (1994) 31 JLR 190 and in his oral submissions to s. 278 of the Judicature (Resident Magistrates) Act and ***R v Stewart*** (1982) 35 W.I.R 296.

Mr. Gayle Nelson for the Crown submitted that the learned magistrate properly and correctly exercised her discretion in directing that the indictment be amended at the time when and in the manner in which it was done. He contended that the decision in ***R v Teong Sun***

Chuah(1991) Crim. L.R. 463 and the cases which follow it reflect the modern position of the law. The nature and substance of the amendment, he said, accorded with the evidence before the court and took into account the challenge of the prosecution evidence through cross-examination.

The Law

Section 6 of the Indictment Act is a general provision relating to a Court's power to amend an indictment.

Subsection (1) thereof provides:

> "**6.** (1) Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the Court thinks fits."

This section gives the Court the power to amend a defective indictment. Where the indictment is not defective the Court has no power under this section to amend. Thus, if the counts amended by the magistrate were not defective the magistrate could not amend them pursuant to section 6 of the Indictment Act. The learned magistrate did not state the reason for her order. The record of appeal shows that immediately after ruling that there was a case to answer, the magistrate stated:

> "Court however, proposes amendment to counts 1, 2,3,4,5, and 7..."

One might conclude that having found that there was a case to answer the magistrate was satisfied that the indictment was not defective. If this was so then section 6 would not empower the magistrate to amend. Probably the magistrate on second thought had misgivings as to the correctness of her ruling, hence her decision to amend.

However, section 278, of the Judicature (Resident Magistrates) Act provides for greater flexibility in the Magistrate's Court in so far as amendment of an indictment is concerned. This section reads:

> "**278.** At any stage of a trial for an indictable offence before sentence, the Court shall amend or alter the indictment so far as appears necessary from evidence or otherwise, and may direct the trial to be adjourned or recommenced from any point, if such direction appears proper in the interest either of the prosecution or of the accused person."

Thus pursuant to this section a magistrate shall amend or alter the indictment "so far as appears necessary from the evidence or otherwise."

In ***R v Egbert Wilson*** (1953) 6 JLR 269 the Court of Appeal (O'Connor, C.J., Carberry and Cools-Latigue JJ) had to consider the significance of the underlined words.

According to the head-note, Wilson was indicted in the Resident Magistrates Court on two counts of larceny. During the course of the trial the indictment was amended by the addition of seven counts charging

falsification of accounts. When the amendment was ordered, no evidence was before the Resident Magistrate which made it appear that the amendment was necessary.

Carberry J who delivered the judgment of the Court said:

> "It has been held by this Court that this section imposes a duty on a Resident Magistrate to amend an indictment by adding counts where the evidence makes it necessary to do so - ***R v Miller and Others*** 3 JLR 136; ***R v Harris and Others,*** 1 Stephens 45.
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> It was held in ***R v McCartney*** 3 JLR 207 that the power to amend includes the addition of an alternative count. The Legislature by using the words 'or otherwise' in the context 'as far as appears necessary from the evidence or otherwise' expressly indicated that the power of amendment was not limited to what was necessary from the evidence, and we are of opinion that the addition of counts to cover facts in the possession of the prosecution and not yet put in evidence is comprehended by the words' or otherwise. The Resident Magistrate was discharging a statutory duty when he ordered the additional counts of falsification."

From this case it can be said with a degree of certitude that a Resident Magistrate has a statutory duty to amend an indictment at any stage of trial before sentence as far as it appears necessary from the evidence or material in the possession of the prosecution.

The next question then is, whether the defect was so fundamental that the Resident Magistrate could not exercise her powers either under section 6

of the Judicature Act or section 278 of the Judicature (Resident Magistrates) Act.

The complaint of the appellant that the magistrate had no power to make such a fundamental amendment as she made at such a late stage is not in my view supported by recent decisions. In the earlier decisions the appellate court was not willing to allow amendments of substance to be made. ***R v Hughes*** (supra) and ***R v Errington*** (supra) are examples of the earlier approach of the appellate court. In ***Hughes*** the indictment contained several counts of false pretences and larceny. The false pretence as stated in the indictment was, "by falsely pretending that he would appoint..." At the end of the prosecution case an application for amendment was made and granted. The false pretences were re-stated in the counts in this way: "By falsely pretending that he the said Robert Hughes was in a position to appoint..." The effect of this amendment was to substitute a representation of an alleged existing fact for words which were consistent with the making or the offering of a mere promise, about the future. The amendment was made pursuant to section 5 (1) of the English Indictments Act 1915 which is identical to section 6(1) of the Jamaican counterpart.

On appeal it was argued "that the learned judge was wrong in allowing all the counts for false pretences to be amended on the close of the case for the prosecution by the substitution of another alleged false

pretence for that stated in the indictment". It was also contended that the appellant Hughes "was seriously prejudiced by having to answer charges containing a different false pretence from that contained in the indictment before it was amended." In delivering the judgment of the court, Hewart L.C.J in referring to section 5 (1) said:

> "In the opinion of the Court, that sub-section is dealing with what it speaks of namely, a case where an indictment is defective. The function of the subsection is to enable the Court in order that justice may be done, to remedy a defect in the indictment. This is a wholly different matter from revising and altering the substance of what is charged. As this indictment was copied and passed it alleged a false pretence which was no false pretence at all. The evidence that was given was largely consistent with the view that a representation of that kind, and not of another kind, was made; and in our opinion it would be a bad precedent, in the circumstances of such a case as this, to permit the re-writing of the false pretence at the conclusion of the case for the prosecution so as to introduce into the indictment for the first time the fundamental ingredient of a representation of an alleged existing fact. It was not correcting a defect in the indictment, it was altering its substance in circumstances in which, as it appears to us the defendant was prejudiced by the alteration.

The convictions were quashed. That was the approach of the Appellate Court then. The present position is set out in ***R v Johal and Ram*** [1972] 2 All ER 449; 56 Cr. App R.348 where it was said, inter alia, that the Court has power to order an amendment which involves the substitution of a different offence for that originally charged in the indictment or

even the inclusion of an additional count for an offence not previously charged in the indictment. An amendment of any kind, including the addition or substitution of a count may be made at any stage of the trial provided that having regard to the circumstances of the case and the power of the court to direct a separate trial of any accused or to postpone the trial, the amendment can be made without injustice-see **Archbold** , 1998 1-151.

In ***R v Teong Sun Chuah and Teong Tatt Chuah*** (1991) Cr. L. R. 463 charges of "obtaining services by deceit" were substituted for charges of "obtaining property by deceit" at the end of the prosecution case after no case submission. It was held that no injustice was done and that the amendment only deprived the defence of a technical and unmeritorious acquittal. And that though the amendment was done at a late stage of the trial the substance of the allegation remained the same throughout and there was no prejudice to the defendants.

As I have said before, the counts in question were clearly defective in that they did not accord with the evidence. Section 278 of the Judicature (Resident Magistrates) Act imposes a duty on the magistrate in the circumstances to amend the indictment. She cannot in my view be faulted for carrying out her statutory duty. She however erred when she ruled that there was a case to answer before directing that the counts be amended.

Lord Gifford Q.C. further contended that the magistrate erred in not permitting the recall of certain witnesses. He repeated in substance the submissions made by Mr. Scott in the court below to which reference has already been made. (see p. 20 supra).

Section 278 (supra) states that the court "may direct the trial to be adjourned or recommenced from any point if such direction appears proper in the interest either of the prosecution or of the accused person." It seems to me that, in the circumstances of this case, the magistrate should have acceded to the request of the defence to have the witnesses recalled. The cross-examination of the witnesses, in particular Mr. Bentley Rose was directed to the allegations as originally framed. To amend the counts without giving the appellant's counsel the opportunity to challenge the witnesses in respect of the 'new' false pretences would certainly be prejudicial to the appellant and might well have resulted in injustice.

There can be no doubt that the recall of the witnesses for further cross-examination would be in the interest of the appellant. As Lord Gifford submitted, different lines of enquiry would be relevant in light of the change of focus in the amended counts, for example the mandate would have assumed significance. In addition the signature of Mr. Rose on the corporate resolutions which were not limited to any specific amounts would have been explored. As the learned Queen's Counsel

contended, counsel for the appellant at trial had sculptured his cross-examination to the original charges as he was obliged to do.

Accordingly, in my judgment, the convictions of the appellant on counts 1,2,3,4, 5 and 7 cannot stand.

Ground 3 – No evidence to support conspiracy charges

In counts 12 and 13 the appellant McKenzie was charged together with his wife Elaine McKenzie with conspiracy to defraud. It was alleged that they "conspired together and with other person unknown to defraud" Benros of $357,000.00 and $198,950.40 respectively by falsely pretending that Elaine McKenzie was an authorised signatory on the account of Benros at the Workers Bank, Tower Street branch. In count 12 the relevant cheque was Workers Bank cheque #000295 dated 14th December, 1994 for $357,007.00 payable to Fidelity Finance Merchant Bank- exhibit 9.

Count 13 involved Workers Bank cheque #000296 dated 20th December 1994 for $198,950.40 payable to Life of Jamaica –exhibit 10. Both of these cheques carry the signatures of Winston McKenzie and Elaine McKenzie.

The issues relating to these counts were whether the transactions were genuine and whether Elaine McKenzie was an authorised signatory on the account.

At pages 799 to 805 the learned magistrate stated her findings of fact and conclusion. She found that on the 13th December, 1994, Mr. Rose signed an agreement with Fidelity Finance. Mr. Rose gave the appellant Winston McKenzie $357,000.00 in cash to pay Fidelity's commitment fees for two loans of $3.5M each. One of these loans was obtained on the 14th December, 1994. He gave McKenzie the cash because there were insufficient funds in the Workers Bank. Sometime after McKenzie was forced to resign from Benros, Mr. Rose saw a cheque (exhibit 9) which was drawn on Benros account at Workers Bank in favour of Fidelity for $357,007.00. This cheque had two signatures. Mr. Rose recognised one of them as that of the appellant McKenzie. He later discovered that the other signature was that of the appellant's wife Elaine McKenzie who was a shareholder and Director of Marco Co. The magistrate accepted Mr. Rose's evidence that he did not authorise the drawing and issuing of this cheque.

The magistrate also found that Mr. Rose gave McKenzie cash to pay Life of Jamaica in relation to insurance policies. The magistrate accepted the evidence of Mr. Oswald Clarke a life underwriter employed to Life of Jamaica that McKenzie took him to Mrs. Elaine McKenzie and asked her to sign a cheque- exhibit 10. Mrs. McKenzie signed the cheque and according to the witness Clarke she "grumbled about this foolishness he was bringing to her again." The court accepted Mr. Clarke's evidence

that McKenzie gave him a cheque to pay Life of Jamaica. The magistrate found that Mr. Rose knew nothing about the cheque – he did not authorise it. Mr. Clarke identified exhibit 10 as the cheque McKenzie handed to his wife for her signature. He identified his writing on exhibit 10. He said that the sum of $198,950.40 went to pay for the reinstatement of Rose's policies which had lapsed through non-payment. He also identified the signatures of the appellant McKenzie and Mrs. McKenzie.

Another witness Miss Pamela Smith identified exhibits 9 and 10 as cheques drawn on Benros' account at Workers Bank, Tower Street. Miss Smith compared exhibits 9 and 10 with exhibits 2 and 3 - cheques for $119,000.00 and $81,369.86. Exhibits 2 and 3 were signed by Mr. Rose and Mr. McKenzie, they bore the stamp "Director". There was no such stamp on exhibits 9 and 10. She referred to exhibit 16 which indicated that Mrs. Elaine McKenzie's authority to draw cheques commenced on the 3rd January, 1995, whereas exhibits 9 and 10 were signed by her on the 14th and 20th of December, 1994. She testified that she was unable to say what was the basis for the negotiation of exhibits 9 and 10 in 1994.

She referred to exhibit 13 – a signature card. This card has the signatures of Mr. Rose and Mr. McKenzie. It indicates that "all cheques over $5,000.00 require two (2) signatures". It is dated 11th September, 1991. She testified that in 1994, exhibit 13 would be operative and not exhibit 16. She said, "if the branch officer informed himself in relation to

exhibit 13, the cheque should have been referred maybe to a manager or supervisor to take a decision on the matter." Miss Smith also testified that exhibit 9 was negotiated at the Workers Bank Tower Street on the 15th December, 1994 and exhibit 10 on the 22nd December, 1994.

The magistrate found that Mrs. Elaine McKenzie's signing of the cheques was without the knowledge or approval of Mr. Rose and that this was dishonestly and fraudulently contrived by the appellant, McKenzie. The magistrate concluded that McKenzie used the cheque exhibit 9 to pay Fidelity because he had "disposed of the money given to him by Mr. Rose for that purpose."

The magistrate found that McKenzie fraudulently obtained his wife's signature to the cheques because he knew that two signatures were necessary to withdraw the sums of money specified thereon. She concluded that Mr. McKenzie knew that his action was dishonest and fraudulent.

In relation to Elaine McKenzie the magistrate held that although her action was cause for suspicion, there was not an inescapable inference that she was part of a conspiracy. She accordingly found her not guilty on both counts.

Thereafter the learned magistrate correctly stated: "the only issue left for the court to decide is whether there is evidence before the court of at least a third conspirator albeit unknown". After examining the

evidence, the magistrate stated that she found it incredible that McKenzie could have had exhibit 9 and 10 negotiated without a partner in crime. The magistrate expressed herself in this manner:

> "...there must have been at least one person who colluded with Mr. McKenzie to perpetuate fraudulent and dishonest acts (sic) in relation to the Benros Account."

She accordingly found him guilty on counts 12 and 13.

Before us learned Queen's Counsel for the appellant submitted that this decision was plainly wrong. It was contended that the verdicts were not supported by the evidence and that there was no suggestion as to who this other person might be. Counsel argued that there was no third person involved in the transactions. It was submitted that the evidence left no room for the inference that any person other than the appellant and his wife was involved in securing the payment of the money concerned. He argued that the magistrate having acquitted Elaine McKenzie was obliged to discharge the appellant. He relied on ***R v Plummer*** [1902] 2 K.B 339. Further, counsel for the appellant submitted that Mr. McKenzie if fraudulent, could have involved the bank officer innocently to negotiate the cheques. To found a conspiracy, the second person must be a party to the same agreement.

Mr. Nelson for the Crown submitted that there was sufficient evidence from which the magistrate could infer that the appellant conspired with at least one other to defraud Benros as charged in counts

12 and 13. He referred to ***R v Anthony*** (1965) 2 QB 189. He further submitted that a person may be guilty of conspiracy even if when he entered into the agreement he intended to participate in only part of the course of conduct involving the commission of an offence. For this submission, he relied on ***R v Anderson*** (1985) 2 All ER 961HL.

Now the essence of the crime of conspiracy is the agreement of two or more persons to do an unlawful act. To constitute the offence nothing need be done in pursuit of the agreement – proof of the agreement is enough. The course of conduct agreed upon is critical. Proof of the existence of a conspiracy is generally a "matter of inference deduced from certain criminal acts of the parties accused done in pursuance" of an agreed course of conduct.

The learned magistrate in her findings stated:

> "The Court bears in mind the evidence of Miss Smith about the negotiation of these cheques, that if any bank officer informed himself about the signatures from both the history card and the signature (card), questions would have been raised. If they had examined exhibit 14 the corporate resolution, Mrs. McKenzie's name would not have been there. The question would have to be asked as to why her signature was placed on the cheques. There is no evidence that Rose was ever called by the bank about these cheques.
>
> The court finds that there must have been at least one person who colluded with Mr. McKenzie to perpetrate fraudulent and dishonest acts in relation to Benros Account."

The above must be seen in the light of the evidence that Mr. McKenzie was the Assistant Manager at the Tower Street branch of the Workers Bank in 1991 when the Benros account was opened and that he knew persons working at the bank in December 1994, when the cheques were negotiated. Further the evidence which the magistrate accepted is that attempts were made to fraudulently add Mrs. Elaine McKenzie as a signatory on the Benros account at the Bank. However, the document giving her the authority to sign (exhibit 16) is dated 3rd January 1995. As we have seen this would be sometime after exhibits 9 and 10 were negotiated. This, apparently, was a clumsy attempt at cover-up.

In my opinion the evidence which the magistrate accepted is sufficient to establish that Mr. McKenzie and another person conspired to defraud Benros as charged. It is interesting to note that in ***Scott v Metropolitan Police Commissioner*** (1975) A.C. 819 at page 840 Viscount Dilhorne stated:

> "[A]n Agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would or might be entitled and an agreement by two or more to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud."

Thus it would seem that there is no need for anyone to be deceived if the course of conduct agreed by the parties is carried out – See Michael J Allen's Textbook on Criminal Law 5th Edition p. 247 para. 8.3.4.1.1.

In my judgment the appellant McKenzie's appeal in respect of counts 12 and 13 should fail.

Melanie Tapper

I now turn to the appeal of Mrs. Melanie Tapper. As stated before, the appellant Tapper was charged on counts 9,10 and 11 with conspiracy to forge documents, conspiracy to defraud and fraudulently causing money to be paid out respectively. She was charged jointly with Winston McKenzie on counts 9 and 10. She was acquitted of the charges on counts 9 and 10 and convicted on count 11. It is from this conviction that she now appeals.

The particulars of count 11 read:

> "Melanie Tapper between the 20th day of June, 1995 in the parish of Saint Andrew, with intent to defraud caused Trafalgar Commercial Bank to pay $2,000,000.00 against the account of Bentley Rose by virtue of Trafalgar Commercial Bank cheque #002038 dated the 20th day of June, 1995, payable to C.I.B.C. (Jamaica) Limited in the sum of $2,000,000.00 by falsely pretending that the said Bentley Rose had applied to the said Trafalgar Commercial Bank for a loan and had instructed the said Trafalgar Commercial Bank to pay the said sum over to the said C.I.B.C. (Jamaica) Ltd.

Outline of Facts

The appellant Tapper was in 1994 the Manager of the New Kingston Branch of the C.I.B.C. In 1995 she left C.I.B.C. and became the Manager

of the Trafalgar Commercial Bank (T.C.B). Benros operated accounts at C.I.B.C and T.C.B. The Benros account at C.I.B.C was opened in November, 1994 and that at T.C.B. sometime between 10th April, 1995 and 10th May, 1995.

Mr. Rose testified that around mid 1994, in the name of Benros, he made two loan applications, one to C.I.B.C for $115M and the other to T.C.B. Mrs. Tapper was then the Manager at C.I.B.C. Mr. Rose and Mr. McKenzie had several meetings with Mrs. Tapper concerning the loan. At the time of the application Rose left three Titles to land at C.I.BC.

According to Mr. Rose this application was refused. At Rose's request Mrs. Tapper arranged for commercial paper financing for Benros through C.I.B.C. New Kingston. Mr. Rose stated that he received two sets of commercial papers for $4M each. $4M went to Benros account at C.I.B.C. and $4M to Marco's account at Eagle Commercial Bank. Mr. Rose also testified that he received a further sum of $7M from 3 sets of commercial papers at C.I.B.C. This would make a total of $15M. Mr. Rose said that he used $4.6M and withdrew $7.4M. The latter was from Fidelity Finance. He said that he gave McKenzie cheques to pay the interests on the commercial papers.

In August 1994, Mr. Rose applied for a loan from T.C.B for himself. This application was dealt with by one Mrs. Tulloch.

In 1995, when Mrs. Tapper was General Manager, he made another application, this time in the name of Benros for $2.5M. Both Mr. Rose and Mr. McKenzie were involved in this application. This application was processed by Mrs. Tapper. The $2.5M loan was placed in Benros' account at T.C.B. Benros subsequently got a further loan of $1.5M.

On April 24, 1995, while Rose and McKenzie were in the office of Mrs. Tapper, Rose complained about certain cheques which were honoured by C.I.B.C. Mr. Rose testified that on three occasions applications for additional commercial paper financing were made. These applications were not successful. The reason Mr. McKenzie gave for this was that other prospective borrowers had offered higher interest rates.

On May 26, 1995 as a consequence of irregularities in respect of the issuing of certain cheques there was a meeting of Mr. Rose, Mr. McKenzie and Mr. Clarke a shareholder. Following upon this meeting Mr. McKenzie and Mr. Clarke transferred their shares and resigned from the companies.

On May 31st 1995 Mr. Rose went to C.I.B.C. and was advised that Benros owed $22M on the various transactions as against $15M which he knew about. Mr. Rose questioned Mr. McKenzie about this. Mr. McKenzie agreed that the company had not borrowed so much.

On 2nd June 1995, Rose gave C.I.B.C, Mrs. Tapper at T.C.B , Workers Bank and Eagle Commercial Bank a copy of McKenzie's resignation letter.

Rose received a statement of account from Mr. Lloyd Ramdeen of C.I.B.C. At T.C.B, Rose told Mrs. Tapper that he got a statement from C.I.B.C. which indicated that $22.3M was the total amount disbursed and that there was a balance of $14.3 M. He told Mrs. Tapper that he knew nothing about that amount. He also told her that McKenzie had informed him that he, Rose did not get the funds sought because someone had offered higher interest. Rose said that Mrs. Tapper's response was that they needed to have a meeting.

This meeting took place at Mrs. Tapper's office during the first half of June, 1995. (Mrs. Tapper was then the manager at T.C.B.) At the meeting were Mrs. Tapper, McKenzie, Mr. Rose and Mr. Harley. This meeting concerned the amount of the loan at C.I.B.C. which Rose said he knew nothing about. The meeting was transferred to Mr. Tapper's office because of Mr. Rose's outbursts during the discussions.

At the suggestion of Mrs. Tapper it was agreed that the dispute should be referred to the Dispute Resolution Tribunal (D.R.T.) on 24 June, 1995. Mr. Rose's evidence is that prior to the D.R.T. meeting, i.e. on the 16th June, 1995, Mr. and Mrs. Tapper came to his office. Mrs. Tapper told him that some of the commercial papers they got were from one Mr. Cardoza o/c "Jessie Hog" a notorious "bad man". She said that after the directors had resigned "Jessie Hog" went to C.I.B.C. and told the manager to call in the loan. According to Rose Mrs. Tapper related how

"Jessie Hog" cursed "a whole heap of bad words", took out his gun placed it on the manager's desk and threatened that if he did not get his money he would go to T.C.B and shoot her. Rose testified that Mrs. Tapper cried and said she was afraid of "Jessie Hog" as she had to pass his home to get to her home. Mrs. Tapper, he continued, told him that if she faced any embarrassment she was going to look for the highest building in new Kingston and jump off. Her husband interjected "we have to try and find the money and give back to Jessie Hog because he would do it". Mr. Rose said he told the Tappers that it was their problem. Mrs. Tapper he said, admitted that she had sent the commercial papers for Rose's signature as well as documents to replace others which were mislaid.

Mrs. Cynthia Rose gave evidence in support of Mr. Rose's evidence as to what took place in the latter's office on the 16th June, 1995. Mrs. Tapper denied that there was any meeting at Mr. Rose's office on the 16th. She called Mr. Messado who testified that on that day he was at a seminar in Ocho Rios and that Mrs. Tapper was there also.

Mr. Ramdeen in his testimony also supported Rose's evidence as to the "Jessie Hog" incident at C.I.B.C. Mr. Ramdeen also explained that a customer who wished to borrow money through commercial papers would be required to sign a promissory note and that such signing would be witnessed by a representative of the bank. The promissory note, he said, would be dated and would indicate the amount, interest rate,

maturity date and would bear the signature of the borrower. Records of the transaction are kept on ledger card at the bank. Mr. Ramdeen identified exhibits 27 a to e and 48 a, b, and c as copies of commercial papers issued to Benros through C.I.B.C. The total of these 8 promissory notes was US$22.3M. Exhibit 27b was issued on February 10, 1995 for $2M. The maturity date was August 10, 1995. It was signed by Rose and McKenzie. The investors were David and Hyacinth Cardoza. Exhibit 27c was also issued on 10 February, 1995. It was for $1M with maturity date being 10 August 1995. It was also signed by Rose and McKenzie and the investors were David and Hyacinth Cardoza. It should be noted that the evidence is that the loan in respect of the commercial papers issued in February was not received by Benros.

Mr. Ramdeen also identified exhibit 56 which indicated that Benros made payments on three promissory notes. Two of those concerned David Cardoza (Jessie Hog) –one for $2M paid on the 20th June, 1995 and the other for $1M paid on the 28th June, 1995. The source of the payment is stated as T.C.B. Exhibit 57 is a copy of the manager's cheque for $2M from T.C.B. payable to C.I.B.C. Mr. Ramdeen stated that he got these sums and they were actually paid over to Mr. Cardoza. Both of these notes were paid before the maturity date which was the 10th of August, 1995. According to Mr. Rose, after the meeting with Miss Donna Parchment a member of the Dispute Resolution Tribunal (D.R.T.) he went

to his office. Mrs. Tapper and Miss Parchment accompanied him. While they were in his office Mrs. Tapper told him that she could lend him $36M in three parts of $12M each. Two parts would be in the company's name and one part in Mr. Rose's name. His evidence is that Mrs. Tapper went on to say that the offer of this loan was with a view to regularizing his (Mr. Rose's) business and to giving Mr. McKenzie and herself time to pay back the money at C.I.B.C. Mr. Rose stated that Mrs. Tapper explained to him that each "part of the loan would have to be in two segments because Mrs. Tapper's loan limit as manager was $7M. Any sum over the limit would have to get the board's approval and that would take a long time.

The learned magistrate accepted Mr. Rose's evidence that Benros did not receive all of the $22.3M and that Mrs. Tapper knew that he was challenging this amount.

The magistrate accepted Rose's evidence that on the 16th June, 1995 Mrs. Tapper and her husband visited Rose's office and expressed concern about the Cardoza commercial papers. The magistrate accepted the evidence of Mr. Rose and Mr. Ramdeen that Cardoza visited the bank and demanded payment on the promissory notes before the expiry dates. The magistrate found that Mr. Rose was unwilling to accept liability in respect of those notes and expressed this to Mrs. Tapper. The magistrate accepted Mr. Rose's evidence that Mrs. Tapper informed him of the facility of a loan at T.C.B.

She found that Mr. Rose did sign six sets of documents in blank on the 26th June, 1995 at T.C.B. These documents were handed to him by Mrs. Tapper. Subsequent to the 26th June, 1995 Mr. Rose spoke to Mr. Ramdeen and Mrs. Tapper about registered mortgages on two of the titles to his properties and a caveat on another. He wanted to know why these mortgages and caveat were entered on the titles when he and his companies had received no loans from C.I.B.C. Mrs. Tapper, he said, told him that she had lent $2M to Benros when she was at C.I.B.C. and that was the reason for registering the mortgages and placing the caveat on the titles. Mr. Rose had of course disavowed any responsibility for such a loan.

Mr. Ramdeen testified that there was no record of loans to Benros or Macro apart from the commercial papers. Mrs. Allison Rattray, attorney-at-law, company secretary and legal officer with C.I.B.C spoke of witnessing the signatures of Mr. Rose and Mr. McKenzie on the commercial papers. The bank she said was in the position of a broker. It took steps to profit itself. In this regard the bank got three (3) duplicate Certificates of Title from Benros. Two mortgages were executed against these titles. The mortgages were registered on the Certificate of Title when Benros defaulted on the promissory notes.

A letter (exhibit 17) written by Mrs. Tapper to Mr. Rose refers to $2M used to repay a $2M loan granted to Rose on the 20th June, 1995. Mrs.

Jeneive Tulloch in a statement dated 5th March, 1997 (exhibit 70) said that the $2M demand loan was closed by her on the instruction of Mrs. Tapper, the General Manager of T.C.B. The handwriting expert, Mr. Carl Major's opinion is that the person who wrote on the photocopy of the undated T.C.B demand loan for $2M was the same person who wrote on the document containing Mrs. Tapper's questions and answers. After referring to the evidence of Mr. Rose in some detail the learned magistrate found that Mr. Rose did not sign this demand note on the 20th June, 1995. She found that Mrs. Tapper caused the amount of $2M to be paid out of Rose's account at T.C.B to C.I.B.C. on the 20th June, 1995. She found that no loan transaction between Mr. Rose and Mrs. Tapper took place on the 20th June, 1995. She accepted Mr. Rose's evidence that Mrs. Tapper only offered him the facility of a loan on the 24th June, 1995 and that the actual transaction took place on the 26th June, 1995. She held that Mrs. Tapper used the facility of the loan for $7M applied for by Mr. Rose to close the demand loan of $2M and that by then the $2M had already been transferred to C.I.B.C without Rose's approval or consent.

Grounds of Appeal, Submissions and Analyses

Eight grounds of appeal were filed and argued by counsel on behalf of the appellant, Mrs. Tapper.

Ground 1

The complaint in this ground is that the learned Resident Magistrate erred in law in failing to acknowledge or give directions to herself as regards the appellant's good character.

Mr. Ramdeen who knew Mrs. Tapper from 1976 and worked with her at C.I.B.C. for many years, said that he " knew Mrs. Tapper to be an honest and reliable person". Mr. Jeffrey Messado, a chartered accountant and company director testified that he knew Mrs. Tapper from at least 1987. He was a director of Trafalgar Development Bank. He stated that he "found her to be someone of her word and professionally, when she used to make presentation on behalf of Trafalgar Development Bank, and also as my Bank Manager, found her to be professional and competent. In all my dealings there was no reason to doubt her integrity..."

Mr. Morrison, Q.C. submitted that the learned magistrate ought to have given herself a direction as to the relevance of good character of the appellant, in particular in the light of the circumstances of this case, the nature of the charges and the position and general attributes of the appellant. He contended that where, as in this case, a defendant did not give evidence, a direction as to the relevance of her good character to the likelihood of her having committed the offence charged was required to be given. Learned Queen's Counsel cited ***R v Vye*** (1993)

1WLR 471; ***R v Aziz*** (1996) 1AC 41; ***Singh v the State*** (2006) 1WLR 146; ***Gilbert v R*** 68 W.I.R.323 P.C.

It was further submitted, that where a judge sat alone it was necessary that the judge's mind upon the matter should be clearly revealed. In this regard, counsel referred to ***Chiu Nang Hong v Public Prosecutor*** (1964) 1WLR 1279 at 1285. Counsel also relied on a statement of Wright J.A. in ***R v Cameron*** S.C.C.A 77/88 delivered 30 November 1989 that the trial judge "must demonstrate in language that does not require to be construed that in coming to the conclusion adverse to the accused person he had acted with the requisite caution in mind."

Mrs. Karen Johnson for the Crown submitted that the evidence against Mrs. Tapper is so overwhelming that the court should apply the proviso to section 14(1) of the Judicature Appellate Jurisdiction Act. She referred to the unreported cases of ***R v Desmond McKenzie*** SCCA 47/97 delivered 13 October, 1997, ***R v Orville Murray*** SCCA 176/2000 delivered 8th April, 2002 and ***R v Vidal and Thompson*** SCCA 208 & 269/2001 delivered 25th May, 2005.

Counsel for the Crown further pointed out that section 291 of the Judicature (Resident Magistrates) Act requires the magistrate to record in the notes of evidence a statement in summary form of his findings of fact on which the verdict of guilty is found. She submitted that the learned magistrate having complied with this section was not required to do more.

It seems to me that where a defendant on trial in the Resident Magistrate's Court puts his character in issue the magistrate normally should demonstrate that in finding the defendant guilty he/she had in mind the relevant principles as set out in ***R v Vye*** (supra) and approved in ***R v Aziz*** (supra). However, the omission of a magistrate to reveal his mind upon the matter is not necessarily fatal – see ***Edmund Gilbert v R*** (supra). In ***Aziz*** Lord Steyn (at p. 53D) said:

> "A sensible criminal justice system should not compel a judge to go through the charade of giving directions in accordance with Vye in a case where the defendant's claim to good character is spurious."

The following statement of Lord Bingham in (***Singh v The State***) (supra) in relation to a good character direction on credibility, I would venture to think, is equally applicable to a good character direction on "propensity". The learned Law Lord expressed the view that:

> "The omission of a good character direction on credibility is not necessarily fatal to the fairness of the trial or to the safety of a conviction. Much may turn on the nature of the issues in a case and on other available evidence. The ends of justice are not on the whole well served by the laying down of hard inflexible rules from which no departure may ever be tolerated."

Possession of hitherto good character is not a defence, it is merely a factor to be considered in weighing the issue of guilt or innocence. Thus where the evidence against an accused person is overwhelming, evidence of good character will hardly avail him. A direction as to the

relevance of good character to the appellant's credibility was not necessary since she did not give evidence. As counsel for the appellant submitted, the real question is whether the conviction of the appellant is rendered unsafe by the failure of the magistrate to demonstrate that she was mindful of the relevance of good character, to the likelihood of the appellant having committed the offence.

In the instant case the prosecution's case against Mrs. Tapper, to a great extent, is based on documentary evidence and the evidence of Mr. Rose as to statements alleged to have been made by Mrs. Tapper. Although some of the documentary evidence does not support Mr. Rose's evidence, the magistrate in considering the evidence as a whole accepted Mr. Rose as a credible witness. There was no evidential deadlock to be resolved. It seems to me that in the circumstances the good character evidence would be of little, if any, probative significance. In my judgment the learned magistrate's failure to reveal her mind on this matter is not fatal.

Ground 2

The complaint in this ground is that the learned resident magistrate erred in law in failing to warn herself that Mr. Rose was a witness who plainly had an interest to serve and therefore qualified as a suspect witness and that his evidence should therefore be viewed with caution.

Mr. Morrison, Q.C. contended that Mr. Rose's heavy indebtedness to various financial institutions including C.I.B.C. of which Mrs. Tapper was the manager provided reason to suspect that he was a person with some improper motive. Counsel further contended that the ongoing litigation against those financial institutions which arose out of the same set of facts in which Mr. Rose was claimant, provided evidence that he probably had an interest to serve. Learned Queen's Counsel submitted that in the circumstances, the learned judge should have warned herself that Rose's evidence should be approached with the greatest caution . He cited ***R v Beck*** (1982) 1 All ER 807; (1982) 1WLR 461.

Mr. Nelson for the Crown submitted that there was no material to suggest that Rose's evidence might have been tainted by an improper motive. He relied on ***Pringle v the Queen*** (2003)UKPC 9 at 30.

I am afraid I cannot agree with Mr. Morrison that Mr. Rose's heavy indebtedness to financial institutions including Mrs. Tapper's bank and the fact that he was a claimant in various civil proceedings against those financial institutions provide the material to suggest that Rose had a strong incentive to give false evidence against Mrs. Tapper.

It is convenient to state the general rule. In ***Pringle v the Queen*** (supra) their Lordships repeated with obvious approval Ackner LJ's statement of the general rule in respect of potentially unreliable evidence in ***R v Beck*** (supra) at 1WLR 469A:

> "While we in no way wish to detract from the obligation upon a judge to advise a jury to proceed with caution where there is material to suggest that witness's evidence may be tainted by an improper motive, and the strength of the evidence must vary according to the facts of the case, we cannot accept that there is any obligation to give the accomplice warning with all that entails, when it is common ground that there is no basis for suggesting that the witness is a participant or in anyway involved in the crime the subject matter of the trial."

Mr. Morrison did not, of course argue that a full accomplice warning was required in this case or that corroboration was required. His contention as already stated, is that the circumstances required of the magistrate a careful warning to herself that Mr. Rose's evidence should be approached with the greatest caution.

As their Lordships indicated in the ***Pringle*** case the first question then, is whether there was evidence to suggest that Rose's testimony was of such a character as to require the judge to warn herself of the possibility it was tainted.

Mr. Morrison contends that the features to which he referred showed that Rose's evidence was of such a character.

As I understand, the civil litigations which are pending and the criminal charges – the subject matter of this appeal, arose out of the same facts or set of circumstances. The mere fact that Mr. Rose was the claimant in the civil matters does not, in my view, show that there was a risk that he had an improper motive in giving evidence in the criminal

proceedings. Also, the mere fact of his indebtedness to financial institutions is not in my opinion, sufficient to suggest that his evidence may be tainted and should be approached with special care. If that were so, it would mean that the evidence of every person who has an interest in the prosecution of an offence should be regarded as tainted.

In my view there must be evidence which points to the possibility of the witness's evidence being tainted by an improper motive. I have not been able to find any evidence which suggests that Mr. Rose had potential ulterior motives for giving evidence against Mrs. Tapper.

In cross-examination Mr. Rose said that he did not know if the bank was suing him (p. 280). He also said that none of his loans at C.I.B.C. was overdue – p. 288 of record.

During cross-examination he spoke of the many admissions made by Mrs. Tapper and was asked (p. 275):

Q. Do you have an interest in having her (Mrs. Tapper) convicted?

A. Don't know how to answer that question

Q. Because you made a report to police about her

A. If they did not defraud the company I would not be here. I'm talking about my money...

He went on to describe the meetings he had with Mrs. Tapper and others.

In all, he said, Mrs. Tapper made admissions at eight (8) meetings with himself and others including on some occasions her husband and Ms. Parchment. I cannot say that there is evidence that his motive for testifying against Mrs. Tapper was tainted with impropriety and should therefore be approached with caution.

If there was evidence to suggest that Mr. Rose's evidence was possibly tainted, the next question would be how should the magistrate approach such evidence. The authorities seem to show that there may be cases where the correct approach will be to treat the witness as an ordinary witness. In such a case nothing out of the usual need be said – see ***Pringle v The Queen*** (supra) para. 30. On the other hand there may be cases where the magistrate should approach such evidence with caution before accepting it. In other words the "potential fallibility and ulterior motives of that witness" should be examined by the magistrate before accepting that witness's evidence – see also ***Chan Wai-Keung v R*** (1995) 2 Cr. App. R 194 P.C.

It seems to me that if the only factors which might indicate that Mr. Rose had an improper motive for giving evidence against Mrs. Tapper, were his indebtedness to C.I.B.C. and other financial institutions and his being the claimant in litigation against such institutions, the magistrate would be entitled to treat him as an ordinary witness.

Ground 3

Here the complaint is that the learned magistrate erred in finding an intention to defraud on the part of the appellant and that the appellant's actions could have resulted in economic injury to the complainant when there was no evidential basis to do so.

The appellant was charged on count II with a breach of S 35 (1) of the Larceny Act which provides:

> "35. Every person who by any false pretense –
>
> (1) With intent to defraud ... causes or procures any money to be paid ... to himself or to any other person for the use or benefit or on account of himself or any other person ... shall be guilty of a misdemeanor ..."

The burden of Mr. Morrison's submission is that the prosecution failed to prove an intent to defraud on the part of the appellant, Mrs. Tapper. There was no evidence, counsel contended, that any action of the appellant resulted in any economic injury to the complainant, as the learned magistrate found. Reference was made to ***Welham v D.P.P*** (1960) 2 WLR 669 and ***R v Ferguson*** (1913) 9 Cr. App. R. 113 among others.

There can be no doubt that the "intent to defraud" is essential. There can be no conviction without it – see ***R v Ferguson*** (supra). In ***Re London and Globe Finance Corporation*** (1903) 1 Ch 728 at 732 Buckley, J said:

> "To deceive is to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes 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".

The House of Lords in ***Welham v D.P.P*** (supra) in explaining the definition said that "intent to defraud" means an intent to practise a fraud on someone and would therefore include an attempt to deprive another person of a right, or to cause him to act in any way to his detriment or prejudice, or contrary to what would otherwise be his duty, notwithstanding that there was no intention to cause pecuniary or economic loss.

By virtue of Rule 10 of the Schedule to the Indictment Act, it is only necessary to allege and prove an intent to defraud generally without alleging or proving an intent to defraud a particular person where the statute creating the offence does not provide otherwise. Thus on the trial for an offence under section 35 (1) of the Larceny Act, it is not necessary to allege or prove an intent to defraud any particular person. It is sufficient to allege and prove an intent to defraud generally. Where money is obtained by pretences which are prima facie, false, there is an intent to defraud – ***R v Hammerson*** 10 Cr. App. R 121. Also the use of false

statements or documents to obtain money is evidence from which an intent to defraud may be inferred – ***R v Hopley*** 11 Cr. App. R 248.

In the light of the foregoing the magistrate was entitled to find that Mrs. Tapper had an intent to defraud when by false pretences she caused the sum of $2M to be transferred from Rose's account at T.C.B to his account at C.I.B.C. for the purpose of meeting the premature demand of "Jessie Hog". The evidence which the magistrate accepted, is that this transaction was done without Mr. Rose's instruction or approval. She also accepted Mr. Rose's evidence that Mrs. Tapper knew that he was challenging his alleged indebtedness to C.I.B.C in relation to the commercial papers. Mrs. Tapper, in those circumstances, was clearly acting to the prejudice of Mr. Rose's right. Further, from the documentary evidence, it may reasonably be inferred that the appellant falsely pretended that Mr. Rose had on the 20th June, 1995 applied to the T.C.B for a loan of $2M and had instructed the said bank to pay the said sum to C.I.B.C. In my view this ground fails.

Ground 4

The complaint in this ground is

> "that the learned magistrate erred in inferring an intent to defraud on the part of the appellant, Mrs. Tapper, from the fact that the Court found that she knew that Mr. Rose was questioning the amount of the Promissory Notes received by him as there was no evidence that Tapper was involved in any conspiracy with Mr. Mckenzie to defraud the complainant and Mrs. Tapper and

> the Bank were entitled to accept and act on the signature of the complainant on the Promissory Note".

The contention of counsel on behalf of the appellant Mrs. Tapper is that even if Mr. Rose was misled by Mr. McKenzie as to the success of the Promissory Notes which Rose said that he had signed in blank, Benros would still be liable to repay the amount actually borrowed under the Promissory Notes. It is also the contention of counsel for the appellant that the magistrate's "finding that Mrs. Tapper had some interest in the payment of the commercial papers to C.I.B.C. in relation to David Cardoza misconceives the exposure of both Mrs. Tapper and the Bank where the borrower refuses to pay the loan." In this regard counsel referred to Mrs. Alison Rattray's evidence that if there is a default, it is the bank's policy to repay the investor as the bank takes steps to protect itself by holding securities.

It the light of the foregoing, counsel argues that Mrs. Tapper's involvement in the repayment of Benros' obligation under the Promissory Notes would be legitimate steps taken to repay the legal obligations of Mr. Rose's company and could not have resulted in any actual or imagined economic injury to Mr. Rose.

We have seen that although bank records signed by Mr. Rose show that he was indebted to the bank in the sum of $22.3M, Mr. Rose did not accept this as the true position. Documentation signed by Mr. Rose also

shows that he had pledged his company's properties and his own as collateral securities. Mr. Rose testified that in 1994 he made two (2) applications for loans – one to T.C.B and the other to C.I.B.C. The application to C.I.B.C. was for a loan of $115M in the name of Benros. He left three (3) titles to properties at C.I.B.C. at the time he made the application.

Mrs. Tapper was the Manager of C.I.B.C. at the time and she was the person who dealt with him. He said that he signed no documents at C.I.B.C. in relation to the loan or the titles. Mr. Rose testified that Mr. McKenzie would bring documents to him to sign without reading them to him.

Mr. Rose recalled a day in March, 1995 when McKenzie brought him documents from Mrs. Tapper for him to sign. These documents he was told were to replace others which were mislaid. He also recalled signing and placing the company's seal on blank mandate documents as Mr. McKenzie had told him that Mrs. Tapper said the original had been mislaid. He testified that Mrs. Tapper spoke to him about the mandate on several occasions. Mr. Rose spoke of signing and sealing other documents including two (2) sets of commercial papers, signature card, history card and corporate resolution.

After he was informed of his indebtedness to C.I.B.C. he had several meetings with Mrs. Tapper, Mr. McKenzie, Mr. Clarke and others. Mrs.

Tapper's husband, he said, was present at two (2) of the meetings. There can be no doubt that at those meetings Mr. Rose expressed his disagreement with the bank statement as to the amount of his indebtedness. He stated that he knew nothing about some of the loans.

It was at one of these meetings that Mrs. Tapper spoke of Mr. Cardoza's (Jessie Hog's) threat to shoot her if he did not get his money. It was also at one of these meetings that Mrs. Tapper offered Mr. Rose a loan with a view to regularizing his business and to giving Mr. McKenzie and herself time to pay back the money at C.I.B.C. It is against this background that the learned magistrate's finding must be examined.

Further it is the evidence of Mr. Rose that when he asked Mrs. Tapper why were the mortgages registered on two (2) of his titles to properties, she told him that she had lent $2M to Benros when she was at C.I.B.C. However, Mr. Ramdeen testified that apart from commercial papers there were no records of loan to Benros or to Macro.

Mr. Ramdeen stated that C.I.B.C. "got $2M on the 20th June, 1995, and $1M. These were in respect of David Cardoza. These monies were passed on to him".

And, of course, the $2M was by way of cheque drawn on Mr. Rose's account at T.C.B. Mr. Rose said this was done without his instructions or authorization. In my view there is merit in Mr. Nelson's submission that Mrs. Tapper's statement that she lent $2M to Benros when she was at C.I.B.C,

was a concoction devised to provide a cover-up for transferring Rose's money from T.C.B to C.I.B.C. to meet Mr. Cardoza's demand.

In my judgment the learned magistrate cannot be faulted for concluding that Mrs. Tapper had some interest in the payment of commercial papers to C.I.B.C. in relation to David Cardoza. Mrs. Tapper's involvement was not in fact about the repayment of Benros' obligations under the Promissory Notes but rather about the repayment of $2M to Mr. Cardoza of which Mr. Rose knew nothing. This ground, in my view, also fails.

Ground 5

This ground states that the learned Resident Magistrate erred in law in placing a reverse onus of proof on the appellant to account for her whereabouts on the 16th of June, 1995 in circumstances where the prosecution was unable to adequately discharge their burden of proof as to a specific time on the 16th June, 1995 when the alleged admissions were made.

According to the evidence of Mr. Rose (his evidence was supported by his wife Mrs. Cynthia Rose), Mr. and Mrs. Tapper and Mr. McKenzie came to his office on the 16th June, 1995. No evidence was led as to the time of the meeting. Mr. Rose testified that at this meeting Mrs. Tapper admitted that some of the commercial papers were from one Mr. Cardoza (Jessie Hog). Mr. Rose testified that Mrs. Tapper cried as she

spoke of the threats made by Mr. Cardoza. Mrs. Tapper, he said, admitted that she had sent the commercial papers for him to sign along with other documents.

The magistrate after referring to Rose's evidence in relation to the meeting of the 16th June, 1995 said:

> "The defence is alleging that Mrs. Tapper was never present in Mr. Rose's office on the 16th June, 1995.
>
> They called Mr. Jeffrey Messado who testified that both himself and Mrs. Tapper were present at a seminar at Ciboney Hall, Ocho Rios on the 15th June, 1995; that it lasted Thursday 15th, Friday 16th, Saturday 17th and they left Sunday, 18th.
>
> He recalls seeing Mrs. Tapper on the 16th in the morning about 9:00 a.m. and that he saw her during the course of the day".

After examining Mr. Messado's evidence, the learned magistrate said (p 784):

> "...Mr. Messado cannot verify Mrs. Tapper's presence in Ocho Rios all day on the 16th June, 1995; it would not be impossible for her to have journeyed to Kingston at sometime during the course of the day".

Thereafter the learned Magistrate proceeded to consider other aspects of the evidence before stating that she accepted that Mrs. Tapper and her husband visted Mr. Rose's office sometime on the 16th of June, 1995 and expressed concern about the Cardoza commercial papers. I have not been able to find any statement made by the Magistrate which

indicates that the Magistrate placed the burden of proof on the appellant.

The prosecution must of course offer evidence to establish beyond reasonable doubt that Mrs. Tapper was at the meeting on the 16th of June, 1995 before the Magistrate may accept it as a fact. However where an accused wishes to rely on a certain issue or explanation which does not amount to an affirmative defence, he bears an evidential burden of raising that issue by evidence sufficient to justify, though not compel, a finding in his favour on that issue. See Murphy on Evidence 7th Ed. Para 4.11 page 117.

I think, with the greatest respect, that this ground is misconceived.

Ground 6

In this ground the appellant complains that "the learned Resident Magistrate erred in law in failing to uphold a submission of no case to answer having regard to:

> "1. The fact that the Appellant was instrumental in assisting the complainant to secure a loan from the Bank, which was supported by a demand note and mortgage documents bearing his signature, which funds were used to pay off debts for which he was/is legally liable;
>
> 2. The fact that no evidence was adduced by the prosecution to establish that the Appellant was the person who sent or caused funds to be

sent to repay the complainant's indebtedness to C.I.B.C Jamaica Ltd."

To establish the offence charged under S.35 (1) of the Larceny Act, the prosecution must prove that the appellant

(i) made a false pretence as to an existing fact;

(ii) With the intent to defraud and

(iii) That as a result of the false pretence she caused T.C.B to transfer $2M from Mr. Rose's account to C.I.B.C.

The pretence alleged is that Mrs. Tapper represented that Mr. Rose had applied to T.C.B for a loan of $2M and had instructed T.C.B to pay the said sum to C.I.B.C. Mr. Rose testified that he knew nothing about that loan. Mrs. Tulloch in her statement said she did not know who processed the loan. However she said that the Demand Note was in Mrs. Tapper's handwriting. The Demand Note is undated. Mr. Rose testified that on the 26th of June, 1995 Mrs. Tapper gave him six (6) sets of blank documents to sign and that she placed an X where he should sign and that he signed them. These were in relation to the proposed loan of $36M for his business. The learned Magistrate found that Mrs. Tulloch in her statement supported Mr. Rose's evidence that he signed the "loan documents" on the 26th of June, 1995; that he signed them in blank; that Mr. McKenzie signed the

documents after Mr. Rose had left the bank and there was an adjustment to the front page of the letter of commitment.

The Magistrate accepted Mr. Rose's evidence that on the 27th of June, 1995 he returned to the bank. On Mrs. Tapper's instructions he signed a letter addressed to Fidelity Finance. The purpose of this letter was to retrieve the title for one of Mr. Rose's properties. Mr. Rose said he left the letter at the bank. On the 28th of June, 1995 Mr. Rose returned to the bank (T.C.B). Mrs. Tapper, he said, told him the loan was approved and gave him a form to sign. He signed it and so did Mrs. Tapper and Mrs. Tulloch. He placed his company's seal on the last page of the document.

Mrs. Tapper told him to take the document to his wife for her signature. She told him that he should then return the document to her with the commitment fee and thereafter the loan would be disbursed.

Mr. Rose said that he observed Mr. McKenzie's signature in two (2) places on one of the loan documents. This caused him to seek legal advice. He took the loan documents to Attorney-at-law, Mr. Daley.

Mr. Rose said that to his surprise the personal credit application form dated 26th of June, 1995 (exhibit 81) which he had signed in blank reflected that the purpose of the loan was to pay outstanding commercial paper at C.I.B.C. Mr. Rose swore that he had made it clear to Mrs. Tapper that he was challenging the quantum of his indebtedness to C.I.B.C. in relation to commercial papers and was not borrowing

money for that purpose. He was borrowing money for his business. Unknown to him the loan documents he had signed in blank were intended to pay off the outstanding commercial papers at C.I.B.C. starting with the $2M payment on the 20th June, 1995.

Mr. Rose explained that a letter from Mr. Daley to the effect that he, Mr. Rose, had instructed him that he was negotiating a line of credit to pay off outstanding money at C.I.B.C. did not in fact represent his instructions to Mr. Daley but was done in that way so as not to frighten Mrs. Tapper. This letter is without doubt consistent with the appellant's contention in this regard. However, this would go to the credibility of Mr. Rose and this is a matter for the trial judge. The learned Magistrate was of the view that "whatever inconsistencies there may be in Mr. Rose's evidence, the court finds that they do not materially affect his credibility as a witness." The learned Resident Magistrate closely examined and analysed the oral evidence of Mr. Rose, the statements of Mrs. Tulloch, letters from Mr. Daley to Mrs. Tapper, the letter from T.C.B to Fidelity Finance, and a Demand Note for $2M with Rose's signature which was undated, except for the year "1995." The Note has two lines drawn across its face with the words "CANCELLED LOAN NOT ACCEPTED NO COMMUNICATION" typed thereon – see exhibit 39 and exhibit 40. The learned magistrate referred to the evidence of Detective Bailey in relation to exhibit 39. Further the learned magistrate referred to the many

documents tendered in evidence in relation to this loan. She noted that the letter from T.C.B, which Mr. Rose said had his signature alone when he left it with Mrs. Tapper, had the signature of Mrs. McKenzie also. She observed that Mr. McKenzie was, at that time, no longer a director of any of Mr. Rose's companies.

Mrs. Tulloch, in one of her statements (exhibit 83), said that on the 28th June, 1995 when the loan for $7M was to be disbursed, Mrs. Tapper or another staff member presented to her a Demand Note for $2M signed by Mr. Rose with Mrs. Tapper's handwriting in respect of the amount in figures and words, and the year. She stated that Mrs. Tapper told her that "part of the proceeds of the $7M should go towards paying out that $2M".

Mrs. Tapper in a letter dated July 5, 1995 to Mr. Rose (exhibit 17) referred to an agreement with Mr. Rose for T.C.B to remit $3.3M to C.I.B.C to partially settle commercial papers outstanding in the name of Benros. In that letter she also stated that in keeping with Mr. Rose's instructions $2M of the facility was used to repay the temporary loan of $2M which she said was granted to Mr. Rose on the 20th June, 1995. Mr. Rose said there was no such agreement and he gave no such instructions.

In my view there is credible evidence that Mr. Rose did not apply for a loan with a view to settling the outstanding commercial papers at C.I.B.C. and there is credible evidence that Mrs. Tapper knew that he was challenging his indebtedness to C.I.B.C. in relation to the commercial

papers. In my opinion there is also credible evidence from which the learned magistrate could reasonably conclude that Mrs. Tapper caused the sum of $2M to be taken out of Mr. Rose's account at T.C.B. and sent to C.I.B.C. by falsely representing that Rose had given instruction for the payment to be made.

This ground, in my judgment, also fails.

Ground 7. This is the same as ground 6 of the appellant Winston McKenzie which was dealt with at the outset.

Ground 8. reads-

> The verdict is unreasonable and not in accordance with the evidence having regard to the following:
>
> 1. The learned Resident Magistrate failed to reconcile the evidence given by witness Tulloch with the evidence given by the main prosecution witness Bentley Rose and its implication where the handing over and ultimate possession of the Demand Note by Mr. Rose which is the subject matter of the charge, is denied by Mr. Rose.
>
> 2. The Learned Resident Magistrate failed to recognise the true reason for Mr. McKenzie's signature being on the documents re –the $7,000,000.00 loan thereby drawing inferences adverse to the appellant, Mrs. Tapper that were unreasonable and inconsistent with the actual evidence adduced.
>
> 3. The Learned Resident Magistrate erred in accepting the evidence of Mr. Rose who testified that he 'did not seek $7,000,000.00 from Trafalgar Bank to pay off the C.I.B.C. loan and to get working capital" and rejecting the evidence of Mrs. Tapper that he had agreed to the loan to partially settle commercial paper loans and

> repay the temporary loan of $2,000,000.00 granted to him on 20th June, 1995, when the overwhelming evidence in the case indicated that Mr. Rose did borrow the $7,000,000.00 to pay off the C.I.B.C."

The evidence of Mr. Rose which the learned magistrate accepted is that he was not able to read well. Because of this handicap he relied heavily on the assistance of Mr. McKenzie and Mrs. Tapper. The Crown alleges that Mrs. Tapper had him sign loan and other documents in blank. These documents were not read to him. He was led to believe that these documents would be filled out in accordance with his instructions.

The Crown's case simply is that sometime in May, 1995, Mr. Rose had reason to question the amount of Benros' indebtedness to C.I.B.C in relation to commercial papers. By the 2nd June, 1995, Mrs. Tapper was informed of Mr. Rose's unwillingness to accept liability in respect of certain commercial papers.

It is important to recall that in the meeting on the 16th June 1995, Mrs. Tapper admitted sending to Mr. Rose promissory notes for commercial papers to sign, some of which were from Mr. Cardoza. Mrs. Tapper cried as she related that "Jessie Hog" had threatened to shoot her if he did not get back his money. Mr. Rose told her that that was Mr. McKenzie's and her problem because he did not borrow any money from "Jessie Hog".

Subsequent to that meeting Mrs. Tapper told Mr. Rose that she could lend him $36,000,000.00, $12,000,000 to him personally in order that

he might regularise his business and give Mr. McKenzie and herself time to pay back C.I.B.C

On the 26th June, 1995 Mr. Rose went to Mrs. Tapper at T.C.B. Mrs. Tapper gave him six sets of what she described as loan application documents to sign in blank. Mr. Rose signed the documents as directed by Mrs. Tapper.

On the 28th June, 1995, Mrs. Tapper told Mr. Rose that the loan had been approved and gave him a document to sign and seal. Mr. Rose signed it and placed the Macro seal thereon. Mrs. Tapper and Mrs. Tulloch also signed the document. Mrs. Tapper then told Mr. Rose to take the document to his wife for her signature and to return it to her (Mrs. Tapper) with the commitment fee and that thereafter the loan would be disbursed.

This document was not returned to Mrs. Tapper but instead was taken to Mr. Rose's attorney-at-law along with copies of the loan application documents. I will not rehearse what took place between Mr. Daley, Mr. Rose and Mrs. Tapper in relation to these documents – save to say that on or about the 5th July Mr. Rose delivered a letter from Mr. Daley to Mrs. Tapper at T.C.B. Mrs. Tapper asked him if he did not want the $36M loan again. She told him that she had disbursed $7M to his account and that if he returned the documents, he would get the balance of the money.

According to Mr. Rose during their conversation he asked Mrs. Tapper why two of the titles for his properties had mortgages registered on them. She told him that she had lent Benros $2,000,000.00 when she was at C.I.B.C. Mr. Rose denied knowledge of such a loan.

As we have already seen, it transpired that on the instruction of Mrs. Tapper, T.C.B.'s cheque # 002038 dated 20th day of June, 1995 in the sum of $2,000,000.00 payable to C.I.B.C. was drawn on the account of Mr. Rose. This cheque was negotiated before Mrs. Tapper had offered the loan to Mr. Rose and of course, Mr. Rose denied knowing anything about this transaction. The clear evidence is that this transaction was to facilitate the repayment of Mr. Cardoza inspite of Mr. Rose's claim that he was not responsible for Mr. Cardoza's commercial papers.

In my view, as I have indeed stated before (ground 6), there is clear and credible evidence to support the magistrate's finding of an intent to defraud as defined in ***Welham v DPP***. Also there is clear and credible evidence that Mrs. Tapper falsely represented by words and/or conduct that Mr. Rose had instructed T.C.B. to pay $2M to C.I.B.C. The evidence adduced by the appellant, Mrs. Tapper did not in my view weaken the evidence led by the prosecution. The weaknesses in the Crown's case as pointed out by counsel, do not in my view, render the verdict unreasonable and unsupportable.

The magistrate's finding that Rose was a credible witness inspite of the proven inconsistencies, cannot in my view be said to be obviously and palpably wrong. I have considered carefully the many criticisms directed at the inferences drawn by the learned magistrate. The principles which must guide this court in dealing with this ground and which are accepted by this court are to be found in **Ross on the Court of Appeal** 1st edition at page 88:

> "It is not sufficient to establish that if the evidence for the prosecution and defence, or the matters which tell for and against the appellant, be carefully and minutely examined and set one against the other, it may be said that there is some balance in favour of the appellant. In this sense the ground frequently met with in notices of appeal-- the verdict was against the weight of evidence—is not a sufficient ground. It does not go far enough to justify the interference of the court. The verdict must be so against the weight of evidence as to be unreasonable or insupportable. Nor, where there is evidence to go to the jury, is it enough in itself that the judges after reading the evidence and hearing arguments upon it consider the case for the prosecution an extraordinary one or not a strong one or that the evidence as a whole presents some points of difficulty, or the members of the court feel some doubt whether, had they constituted the jury, they would have returned the same verdict, or think that the jury might rightly have been dissatisfied with the evidence and might properly have found the other way. The jury are pre-eminently judges of the facts to be deduced from evidence properly presented to them, and it was not intended by the Criminal Appeal Act, nor is it within the functions of a court composed as a court of the appeal that such cases should practically be retried before

> the court. This would lead to a substitution of the opinion of a court of three judges for the verdict of jury."

In my opinion this ground cannot succeed.

Sentence

I must now turn to the grounds concerning the sentences imposed on both appellants. Both appellants were sentenced to 18 months imprisonment with hard labour. These sentences were imposed on the 28th May 2003, over five (5) years ago. Both appellants were granted bail pending the hearing of the appeal.

It was submitted on behalf of both appellants that the inordinate delay between conviction and appeal constituted a breach of the appellant's rights and it would not be in the interest of justice for the appellants at this stage to be required to serve a term of imprisonment.

The Record of Appeal indicates that the certified copy of the notes of evidence taken by the magistrate was received in the Registry of this Court on August 9, 2007. This would be 4 years and 3 months after the appellants' conviction. Section 299 of the Judicature (Resident Magistrates) Act provides:

> "299.The Clerk of the Courts shall not later than fourteen days after the receipt of the notice of appeal, forward to the Registrar of the Court of Appeal the record of the case together with the notes of evidence or a copy of the same certified as herein

> mentioned and all documents which have been received as evidence or copies of the same certified as herein mentioned."

By virtue of section 300 (ibid) the notes of evidence or certified copies thereof and the documents referred to in section 299 shall be read and received by the Court of Appeal as the evidence in the case. It seems to me that prima facie the post conviction delay of five years is inordinate in the light of section 299. The right of a person charged with a criminal offence to have a fair hearing within a reasonable time is enshrined in section 20(1) of the Constitution which states:

> "20 —(1) Whenever any person is charged with a criminal offence he shall unless the charge is withdrawn be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

This subsection has three elements namely (1) a right to a fair hearing; (2) within a reasonable time and (3) by an independent and impartial court established by law. In ***Bell v DPP*** (1985) A.C. 937 and ***Flowers v the Queen*** (2000) 1WLR 2396 the Privy Council held that these three elements "form part of one embracing form of protection afforded to the individual." However, in ***Kenneth Mills v H.M's Advocate and the Advocate General for Scotland*** their Lordships were of the view that

such a provision contains three separate and distinct guarantees although they are closely related. In the ***Mills*** case the Board was considering part of Article 6 of the European Convention for the protection of Human Rights and Fundamental Freedoms. The relevant part of Article 6 (1) reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time, by an independent and impartial, tribunal established by law."

Their Lordships stated that the object and purpose of article 6 (1) was "to enshrine the fundamental principle of the rule of law." Their Lordships went on to quote with approval a statement they made in ***Darmalingum v The State*** (2000) 1WLR 2303. In that case the Board considered section 10(1) of the Constitution of Mauritius which is modelled on article 6(1) of the European Convention and is to the same effect. The statement is at p.2307H - 2308B and is repeated at paragraph 5 of the ***Mills*** judgment:

> "It will be observed that section 10(1) contains three separate guarantees, namely (1) a right to a fair hearing; (2) within a reasonable time; (3) by an independent and impartial court established by law. Hence, if a defendant is convicted after a fair hearing by a proper court, this is no answer to a complaint that there was a breach of the guarantee of a disposal within a reasonable time. And, even if his guilt is manifest, this factor cannot justify or excuse a breach of the guarantee of a disposal within a reasonable

> time. Moreover, the independence of the 'reasonable time' guarantee is relevant to its reach. It may, of course, be applicable where by reason of inordinate delay a defendant is prejudiced in the deployment of his defence. But its reach is wider. It may be applicable in any case where the delay has been inordinate and oppressive. Furthermore, the position must be distinguished from cases where there is no such constitutional guarantee but the question arises whether under the ordinary law a prosecution should be stayed on the grounds of inordinate delay. It is a matter of fundamental importance that the rights contained in section 10(1) were considered important enough by the people of Mauritius, through their representatives, to be enshrined in their Constitution. The stamp of constitutionality is an indication of the higher normative force which is attached to the relevant rights: see ***Mohammed v The State*** [1999] 2 AC 111, 1 23H. (Emphasis added)"

In their Lordships' view the "reasonable time" requirement is a separate guarantee. "It is not to be seen simply as part of the overriding right to a fair trial, nor does it require the person concerned to show that he has been prejudiced by the delay," see para. 9 of ***Mills*** judgment where their Lordships quoted in extenso passages from Lord Hope of Craighead's speech in ***Porter v Maghill*** (2002) 2 WLR 37. Their Lordships were of the view that the opinion expressed in **Bell** and ***Flowers*** on the scope of "one embracing form of protection" was clearly wrong.

With reference to the hearing within a reasonable time guarantee their Lordships stated that it was of fundamental importance to distinguish clearly between two (2) matters:

(1) the scope of the guarantee and breach of it; and

(2) the question of remedy.

The scope and the breach

In ***Eric Bell v R*** SCCA 16/98 delivered 29 September, 2003, this Court held that the requirement for a hearing within a reasonable time as provided by section 20(1) of the Constitution applies not only to pre-trial delays but also to post trial delays where an appeal is filed. Indeed the ***Mills*** case concerned a breach of the "reasonable time" guarantee in appellate proceedings.

As stated before the post conviction delay of over five (5) years is inordinate. In my judgment such delay without more, constitutes a breach of the appellants' constitutional right to a hearing within reasonable time.

The remedy

The purpose of the "reasonable time" guarantee in respect of the appellate proceedings is to avoid a person convicted remaining too long in a state of uncertainty about his fate- (see para. 54 of the ***Mills*** judgment). In ***Taito v the Queen*** 19 March, 2002, para. 22 the Board stated that the proposition in ***Darmalingnum*** that the normal remedy is to quash the conviction, went too far. While a conviction which was

obtained in breach of the right to a fair trial must be quashed, the position is different where the breach occurs at the stage of an appeal — see ***Mills*** para 50.

It seems to me that only in exceptional circumstances, if at all, would it be justified and necessary to set aside a conviction, which has been upheld on appeal as a sound conviction, on the ground that there was an unreasonable delay between the date of the conviction and the hearing of the appeal.

The appropriate remedies which of course will depend on the circumstances of each case will include a reduction in sentence, monetary compensation or merely a declaration. In this case the appellants were granted bail by the trial judge after they had given verbal notice of appeal. Thus in my view monetary compensation would not be appropriate. A mere declaration would not in my view, be a sufficient remedy as, this would mean that after waiting for over five (5) years the appellants would now have to serve the full sentence.

In my judgment, in the circumstances of this case a reduction in the sentence is the appropriate remedy. I think that a reduction of the sentence from 18 months to 12 months would be sufficient to compensate the appellants for the effects of the delay.

Another relevant factor which was brought to our attention at the end of the hearing is that a sum of about $1.7M was paid to the complainant towards restitution. This we think is a mitigating factor which we shall take into account by suspending the sentence for one year.

Conclusion

Winston McKenzie — counts 1,2,3,4 5, 7 &8

I would allow the appeal in respect of counts 1,2,3,4,5, 7 and 8, quash the convictions, set aside the sentence and enter verdicts of acquittal.

Counts 6,12, and 13

I would dismiss his appeal against conviction in respect of counts 6, 12, and 13. I would allow the appeal against sentence, set aside the sentence of 18 months and substitute therefor a sentence of 12 months on each count suspended for 12 months.

Mrs. Tapper

I would dismiss her appeal against conviction, allow the appeal against sentence, set aside the sentence of 18 months and substitute therefor a sentence of 12 months suspended for 12 months.

HARRISON, J.A.

I agree.

DUKHARAN, J.A.

I agree.

ORDER:

SMITH, J.A.

1. In respect of Winston McKenzie on counts 1,2,3,4,5,7 and 8: the appeal is allowed, convictions quashed, sentences set aside, judgment and verdict of acquittal entered.

2. In respect of Winston McKenzie on counts 6, 12, and 13: the appeal against conviction is dismissed. The appeal against sentence is allowed. The sentence of 18 months is set aside and a sentence of 12 months substituted therefor on each count suspended for 12 months.

3. In respect of Mrs. Melanie Tapper, the appeal against conviction is dismissed. The appeal against sentence is allowed. The sentence of 18 months is set aside and a sentence of 12 months substituted therefor suspended for 12 months.