JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL 45/01

BEFORE: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

R. V. MYRTLE JOHNSON

Ian Ramsay, Q.C. with Deborah Martin for the Appellant

Paula Tyndale & Sandra Chambers for the Crown

4, 5, 6, February & 22nd March, 2002

FORTE, P.

On the 7th May, 1997 after several days of hearing, the appellant was convicted in the Resident Magistrate's Court Manchester for the offence of "obtaining valuable securities" by false pretences of a total sum of $430, 000.00. She was sentenced to nine months' imprisonment, which was suspended for two years.

The appellant is an Attorney-at-law of forty years. The transaction out of which this conviction arose, originated in her legal offices. The false pretences which the Crown alleged in the indictment as inducing Mr. Joseph Allen to part with his valuable securities were:

> (a)The appellant had lawful authority to sell land situated at Dunrobin in the parish of Manchester;

(b) the appellant was authorized to sell the said land;
(c) the vendor of the land was alive and able to contract with Mr. Allen to sell the said land;
(d) the said land could be transferred from the vendor to Mr. Allen at the time the agreement for sale was signed.

In proof of its case, the Crown relied substantially on the evidence of Mr. Joseph Allen who was the proposed purchaser of a piece of land at Dunrobin in the parish of Manchester. Mr. Allen testified that in his pursuit to purchase land, he contacted a Mr. Albert Riley, a real estate agent. After speaking with Mr. Riley, he was taken by him to the legal offices of the appellant. In the absence of the appellant, he spoke to her Secretary, Miss Ellington who dialed a telephone number and handed him the phone. He spoke on the phone with the appellant, whom he told of his interest in the land. She told him that the cost of the land was $900,000.00 but if he signed the agreement on the same day he could have it for $800,000.00. He could pay down half of the amount and the Title could be transferred to him in 6-8 weeks. They negotiated the amount to be paid to "tie" the deal, the appellant going down to $300,000. Mr. Allen could not meet that amount. The appellant then said she would have to give the land to "somebody else." However, having spoken again to Mr. Riley, he went and inspected the land. He liked it, and so went immediately to the bank and obtained a Manager's cheque for $250,000.00 in the name of Myrtle Johnson (the appellant). This he took to the appellant's office. He again spoke to the secretary who called the appellant. He told the appellant that he had the cheque for $250,000.00 and she said it was "OK". The appellant thereafter spoke with her secretary

who prepared a Sale Agreement which Mr. Allen signed. He paid over the cheque to Miss Ellington who gave him a receipt therefor. The Sale Agreement and the receipt in the name of Myrtle Johnson were tendered in evidence. Both are dated the 15th March 1995.

Mr. Allen subsequently paid over other amounts in connection with the purchase. He alleged that the appellant subsequently called him at his office and told him that the transfer costs would be $59,000.00 and that he was required to pay half of that amount. As a result he wrote his personal cheque for $30,000.00 and paid it over. This cheque was also admitted into evidence (Exhibit. 3). It is a cheque payable to Myrtle Johnson for the sum of $30,000.00 and dated 4th April, 1995.

Another manager's cheque for the sum of $150,000.00 was also paid by Mr. Allen. It was paid to Miss Ellington who issued a receipt dated 14th September 1995 in the complainant's favour for $150,000.00 "sale of land between Enith Staple and Joseph Allen." This cheque was paid over as a result of a call made to him by the appellant in which she told him that he had to pay a further $150,000.00. He denied that this amount was paid over as a result of a call from Miss Ellington.

There was also a dispute as to whether a further $10,000 was paid to the appellant for the purpose of rewarding an officer of the Registrar of Titles Office to effect a speedy registration of the transfer of the property. The learned Resident Magistrate resolved this issue in favour of the appellant and so no further reference will be made in this regard. The learned Resident Magistrate, however though finding that there was a lack of proof re the

payment of this sum (the cheque not being available), nevertheless concluded that Mr. Allen spoke the truth when he testified that such a sum was requested by the appellant "representing that it was necessary to speed up the transaction."

Up until December 1995 Mr. Allen had not benefitted from a transfer of the land to him. He had been told by the appellant that Ms. Staple the alleged owner of the land, was in the United States of America, and was coming to Jamaica soon to sign "a transfer document." He had been told this on several occasions, when he had visited the appellant's office "to find out what was holding up the transfer."

Sometime in December 1995 to January 1996 Mr. Allen visited the land where he spoke with an "old man." He thereafter went to Oakland, a cemetery in Mandeville, in Manchester. There he saw a tombstone with the name Enith Staple, and with a burial date which was six (6) months before he had returned from Japan. He had been in Japan in 1994, and it is upon his return to Jamaica, that he set about purchasing the land. In discovering this new information, Mr. Allen spoke with the appellant on the phone and told her that he had discovered that the owner of the land had died several months before he had paid over his money; as a result, he was going to the police. She told him that she was a lawyer of 40 years and sent him to the fraud squad. He testified that at no time "during the transaction" did the appellant tell him that "the lady had died from 1994." He believed that the lady would come to sign the transfer document "at any time" and had he known that "the lady had died" he would not have agreed to buy the land.

Mr. Albert Riley, who gave evidence for the Crown, gave evidence partially inconsistent with Mr. Allen, in so far as the events which took place on the date the agreement was prepared by Miss Ellington and signed by Mr. Allen. His evidence assumed importance, however, in his agreement with Mr. Allen that the agreement was prepared and the first cheque paid on the 15th March 1995. That date as it turned out became a serious issue in the case, because of the unchallenged evidence that Enith Staple had died in October 1994 and consequently could neither be giving instructions to the appellant nor signing any document in March of 1995.

The date became an issue because the appellant in her defence maintained, in spite of the documentary evidence, that the transaction with Mr. Allen took place in 1994. She had discussions with Mr. Allen in 1994. She was not aware that he had paid the cheque for $250,000.00 and had signed an agreement on the 15th March, 1995. This was done by her secretary without her knowledge. She denied even speaking with Mr. Allen on the telephone on the 15th March 1995. She only became aware in May of 1995 that the monies had been received in her office and that an agreement had been signed.

On these issues the learned Resident Magistrate found as follows:

> "I find on the totality of the evidence that it was on the 15th of March 1995 that the complainant made the offer to purchase. I accept the evidence of Mr. Riley that the complainant had seen the land before – some time in 1994 – but made no offer to purchase it until March of 1995 and I reject the evidence of the accused that it was in September/October of 1994 that the complainant had made the offer.

> I find that the Sale Agreement confirms that it was on the 15th of March 1995 that Mr. Allen commenced the transaction and I further find that this agreement was prepared on the instructions of the accused. I accept the evidence of Mr. Riley that he had spoken to her on the telephone on the 15th of March 1995 and she had told him that she would instruct her secretary Miss Ellington to prepare the Sale Agreement. In her evidence before this Court she has denied giving those instructions but I find this denial to be untruthful.
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> ...
>
> I accept beyond a reasonable doubt the evidence of Mr. Allen that on March 15, 1995 he spoke with the accused and that it was the accused with whom he negotiated for the sale of the land. Although he had not met her then when he subsequently visited her home and spoke with her he was able to recognize her voice as that of the person he had negotiated with on March 15, 1995 and he was further satisfied about her identity by their conversation about the land transaction. I accept that Mr. Riley also spoke with her by telephone and she also gave him instructions in connection with the transaction. I find beyond a reasonable doubt that all the representations made to Mr. Allen concerning this transaction were made by the accused herself and that all that her secretary, Miss Ellington, did was done on her instructions and on her behalf. I reject the evidence of the accused as entirely untrue that she knew nothing of this transaction until May of 1995 when she received a telephone call from a certain bank; that it was only after that telephone conversation that Miss Ellington brought Exhibit 1 and the payment of a deposit of $250,000 by Mr. Allen to her attention. I also reject her evidence that when she met the complainant on August 29, 1995 she did not then connect him with Mr. Joseph Allen of the land transaction. It is nothing short of incredible that the complainant would fail to mention the matter and I believe the complainant's evidence that they did speak about it."

The above stated findings by the learned Resident Magistrate are consistent with the evidence, and are obviously underpinned by the

opportunity she had to assess the demeanour of the witnesses as their testimony unfolded before her. Though the evidential basis of these findings were strongly and analytically challenged by Ms. Martin for the appellant, I can find no valid reason in those arguments to overturn the decision of the learned Resident Magistrate which was based on an admirable and correct assessment of the evidence.

Ms. Martin contended that the evidence re instructions given by the appellant to the secretary was hearsay evidence upon which the learned Resident Magistrate ought not to have acted and that the finding that the appellant negotiated with Mr. Allen is unreasonable. She maintained that the evidence indicated that Mr. Allen negotiated with Mr. Riley and that the latter had said that it was he who had discussion with the appellant and not Mr. Allen. She asked this Court to conclude that based on the inconsistencies, it was not reasonable for the learned Resident Magistrate to make a finding that there was discussion between the appellant and the complainant as regards the payment of moneys towards the purchase of the land. To have found that it was the appellant who initiated the agreement where there is clear evidence that it was Ms. Ellington who acted, is unreasonable.

Mr. Allen testified that having spoken to Mr. Riley, he went to the appellant's office, spoke to the appellant's secretary, who called the appellant, and put him on the phone. He then had discussions with her, after which he went to see the land again, went to the Bank got a manager's cheque for $250,000.00 and returned to the appellant's office. The secretary called the appellant and Mr. Allen had a second conversation with her (the

appellant). Thereafter the secretary again spoke to the appellant, and then prepared the Sale Agreement, and collected the cheque for $250,000.00 from him. In my judgment that was sufficient evidence upon which the learned Resident Magistrate could have concluded that Mr. Allen had direct conversation with the appellant on the phone. The substance of that conversation was accepted by the learned Resident Magistrate; a conversation which indicated that the appellant negotiated the sale of the property with Mr. Allen at a time when she knew that the owner of the land had died. Once the learned Resident Magistrate accepted Mr. Allen as a witness of truth then everything else flowed from that. Mr. Allen testified that in the conversation with the appellant on the 15th March 1995 she told him on the phone that she would give her secretary instructions to prepare the Agreement.

Immediately after that conversation, she spoke with her secretary on the phone, and it was then that Ms. Ellington prepared the Sale Agreement. On that evidential background, it was more than reasonable for the learned Resident Magistrate to come to the conclusion that it was the appellant who made the representation to Mr. Allen which caused him to sign the Agreement and to pay over that first cheque for $250,000.00.

The appellant contended that she had instructions from the vendor Enith Staple to sell the land. As we have seen the learned Resident Magistrate found on the evidence that Enith Staple had died prior to the date of the Agreement. In addition, the evidence revealed that Enith Staple was not the registered owner of the land. In fact that person was Enith's

daughter, Ionie Eileen Staple, who had predeceased her. Although the appellant spoke of the existence of wills of both deceased persons, she admitted that she had done nothing in the Courts of Jamaica, either to have these wills probated or re-sealed since probate had been granted in the United States of America where they both had lived. In addition she had had no instructions from the beneficiaries or executors in respect of the sale of the land. In spite of this, she not only negotiated the sale of the land with Mr. Allen, but on the 19th May, 1995 in sending an undertaking to Mr. Allen's bank the National Commercial Bank, she wrote as follows:

> "Re Sale of Land Mrs. Enith Staples to Joseph Allen
>
> Mr. Joseph Allen has instructed me to inform you that he is the purchaser of All that parcel of land part of Dunrobin in the parish of Manchester containing by survey Nine Thousand Eight Hundred and Twenty-Five Square Feet and Ninety Eight Hundredths of a square foot of the shape and dimensions and butting as appears by the plan thereof registered at Volume 1113 Folio 273.
>
> I am in the process of transferring Title to Mr. Allen which should be completed on or before the 30th of June. The value of the land is Nine Hundred and Fifty Thousand Dollars ($950,000.00). (Emphasis added)
>
> This is my irrevocable undertaking to forward title to you as soon as same is completed on the instructions of Mr. Allen."

The underlined words were obviously words of deception. In May of 1995, the appellant had done nothing to get probate of either the will of Enith or Ionie in order to facilitate any transfer of the property. In fact she had no instructions either from the executors or the beneficiaries in respect of the sale of the land. Yet she was not only giving this undertaking to the

Bank but was also indicating to the Bank that she was in the process of transferring Title to Mr. Allen which should be completed on or before the 30th of June.

On the question of instructions the learned Resident Magistrate found as follows:

> "On her own evidence, the accused had no valid Will in March, 1995 for the estate of Enith Staples. The title for the land in question Exhibit 5 is in the name of Ionie Staples. Through the prosecution's witnesses it has been established that no Probate or Letters of Administration were granted in the estate of Enith Staples. Nor has title to the land been transferred to Enith Staples but all of this is admitted by the accused. She has taken no step to obtain Probate or Letters of Administration.
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> She has not been in touch with the executors of the relevant Will. At one point it appears that she was saying that the Will could not be found. She had made a Will for Mrs. Staples and another had been made by one of her employees which she had not seen. Furthermore according to the accused one of the beneficiaries a grand-daughter of the deceased vendor, a Mrs. Zincke, had been told about Mr. Allen's offer as she knew of the instructions the accused had to sell the land. Nevertheless, Mrs. Zincke had taken such documents as were in the possession of the accused and had given her no instructions to act. That was in May 1995. ... If, as the accused claims all she had to do was to apply to re-seal the Probate which she said she had received from the United States in connection with a Will made there and then get the Executors to execute the transfer why had she not taken the necessary steps to do so? I find beyond a reasonable doubt that on the 15th March 1995 the accused had no instructions to act in this matter."

That finding is abundantly supported by the evidence. If she had no such instructions, then certainly all her dealings with Mr. Allen would be fraudulent. When she requested the further payments of $30,000.00 and

$150,000.00, as the learned Resident Magistrate found, this was a continuance of the false pretences she had been making in relation to the sale of the land. The learned Resident Magistrate specifically found that "before September 1995 when the last payment of $150,000.00 was made she had no instructions to act for the estate of Enith Staples."

In my judgment the findings made by the learned Resident Magistrate clearly established the false pretences which were alleged in the indictment. Those findings were based on evidence which showed that the appellant falsely represented to the appellant that she had authority to sell the land, that the vendor of the land was alive and would sign the agreement when she came to Jamaica, and that the land could be transferred as soon as the Agreement had been signed.

Intent to defraud

The appellant, however, through her counsel contended that the prosecution failed to prove that there was an intent in the appellant to defraud the complainant of the moneys paid to her. It is difficult to deal with this aspect any better than the learned Resident Magistrate did in her findings. She found that there was overwhelming evidence from which the dishonest intention of the appellant could be gleaned; that the appellant in making those false pretences "was engaged in a sham transaction intended to deceive the complainant into parting with his valuable securities." She continued:

> "Her lies before this Court are clearly attempts to cover her tracks and serve only to attest to her dishonest intentions. It is because of her dishonest intentions that she did not tell Mr. Allen that Mrs.

> Staples was dead. I find that she was lying to the police when she said Mr. Allen knew long before December, 1995 that Mrs. Staples was dead. She did not even tell him that the land was not yet in the name of the alleged vendor Enith Staples. She did not tell her secretary that Mrs. Staple was dead either, even though she had told her that it was Mrs. Staples who had accepted an offer of sale and that Mrs. Staples would sign the agreement on her return to Jamaica. It is in an effort to cover up her dishonest intentions that she now seeks to make it appear that it was her secretary who was involved in the transaction with Mr. Allen and that she knew nothing of it until the bank called her.
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> She claims that it was then that she pointed out errors in the agreement of sale, namely that the Christian name of the vendor was wrong, that the vendor had died by then and that a new agreement had to be prepared. Yet up to March 12, 1996, the date of the intervention of the police, no new agreement had been prepared."

The learned Resident Magistrate having continued to examine the evidence, then concluded:

> "The accused proved herself to be a most untruthful witness who spun a web of lies and got caught in it. In the end her lies only served to strengthen the Prosecution's case.

The above words of the learned Resident Magistrate demonstrate that after thorough assessment of the evidence on a whole, she came to the conclusion that the appellant intended to defraud Mr. Allen of his valuable securities.

The appellant, however, through her senior counsel Mr. Ian Ramsay, Q.C. contended that at the end of the Crown's case there was no evidence of an intent to defraud, and that consequently the learned Resident Magistrate should have upheld a "no case" submission. He submitted the following:

1. "The death of Mrs. Staples did not render impossible the sale of the land belonging to her estate."

On this point, I am in agreement with the submission in response, by Miss Tyndale for the Crown, that the evidence demonstrated that there would have been hurdles to the sale of the land. To begin with, the Title was not registered in the name of the proposed vendor, but in the name of her daughter Ionie Staples who was also deceased. There would be great difficulty facing the appellant in dealing with the land. There were two wills none of which (the evidence revealed) had been probated in Jamaica, nor were there any Letters of Administration granted. Indeed, none had been applied for. On the face of these facts, all known to the appellant, she was nevertheless indicating to Mr. Allen, in the negotiation that the land could be transferred – the only delay being caused by the waiting for Mrs. Staple to come to Jamaica to sign the Agreement.

2. The evidence is that the appellant was acting for both vendor and purchaser

This came from the complainant in cross-examination when he said he understood that "Miss Johnson was representing both the vendor and the purchaser." Mr. Ramsay on this basis contended that the appellant would therefore be a stake holder.

In my view there is no merit in this submission. The evidence for the prosecution witness if believed was sufficient upon which learned Resident Magistrate could have found that in the whole transaction the appellant acted with criminal intent, and was not engaged in a transaction in which she

honestly held the funds to await the closure of the transaction at which time the funds would have been paid to the proposed vendor.

3. The appellant, held the funds she received from Mr. Allen in her client's account and there was no evidence that she ever received any benefit from the funds.

The evidence that the money was placed in her client's account, was evidence which came from the appellant. The Crown, as Ms. Tyndale submitted made no effort to prove and had no burden to prove to which account the funds were deposited. The evidence was that long after the funds were paid to the appellant, the complainant was still being deprived. It was not until May 1996 after the police had been called in, that the appellant paid over the sum of $230,000.00 to the Bank in an alleged discharge of the undertaking referred to earlier. This money was paid to the Bank, though the undertaking was for the passing over of the Title on transfer of the property to Mr. Allen. Significantly, there was no indication on the cheque which was exhibited as Exhibit 13, that it was drawn on a Client's Account.

In an argument supplementary to this point, Mr. Ramsay submitted that the complainant received all the money that he had paid over to the appellant in moieties of $200,000.00 and $230,000.00 the latter being the amount paid in respect of the undertaking. The complainant admitted in cross-examination that the appellant had loaned him the sum of $200,000.00 in respect of another transaction in which he purchased another lot of land. He maintained that that had nothing to do with the present transaction. At

the end of the case this is how the learned Resident Magistrate dealt with that issue:

> "Mr. Allen had been asked in cross-examination about a sum of $200,000 which the defence suggested he had requested from the accused out of the deposit he had paid in this transaction. He said the accused had told him she would give him a loan for two weeks because by that time the transfer for the Staples land would be finished."

At the end of the Crown's case, the evidence would have been that the $200,000.00 had nothing to do with the purchase of the land in this case. There would have been no evidence therefore of any partial repayment of the sum paid by Mr. Allen to the appellant in respect of this transaction.

In so far as the payment of the $230,000.00 by the appellant to the Bank is concerned, the following is the record of the cross-examination of the complainant on this point:

> "I am not aware that the Bank called on Miss Johnson to honour the undertaking and she had to pay $230,000. Don't agree that I am not speaking the truth when I say I am not aware that she had to pay $230,000.00 on my behalf.
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> Yes I am aware that the Bank Manager there is Mr. Leroy Harding. He was the bank Manager there in April, 1996. He was then on leave. In May 1996 he was also the Bank Manager there. No it is not correct that Mr. Harding told me that he got cheque for $230,000 from Miss Johnson to satisfy undertaking to Bank.
>
> Don't agree that he told me so. Don't agree that I am not speaking the truth when I say he did not tell me this."

At the end of the Crown's case, there was in fact no evidence that the appellant had paid over to the complainant the sum of $430,000. In any

event, as Miss Tyndale contended, restitution only goes to mitigation of sentence. Once the ingredients of the offence have been established, the fact of repayment cannot erase the criminal liability that the acts of the appellant accrued. It is interesting to note, however how the learned Resident Magistrate dealt with the payments at the end of the case when she had heard from the appellant and her witness.

This is what she said, speaking firstly of the $200,000.00 and thereafter of the $230,000.00.

> "On the evidence of the accused this sum was requested as a loan and she had said it had to be from the deposit to be repaid as soon as the new agreement had been prepared. Mr. Allen insists that this was a loan from the accused unrelated to funds he had paid on the land transaction. Interestingly the money came from the accused personal bank account and not from the client's account into which she claimed that his payments had been lodged. Her explanation was that she was at home but that can hardly be a valid reason since her office was operating and her secretary was in touch with her on a very regular basis. It seems very reasonable to conclude that the $200,000 was a loan from the accused, drawn on her personal account. This was a loan and not a partial refund of his deposit. She expected this money to be repaid and within a short time too.
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> It was only when things started to fall apart that she sought to treat it as a refund. I find that there was no question of this sum being a refund because the complainant was still pursuing the Sale transaction.
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> After the police became involved in the matter the accused and her witness Mr. Leroy Harding engaged in a plan to divest the accused of the sum of $230,000. This was designed to represent the sum as a 'balance' of the funds, which the accused received from Mr. Allen, since the loan of $200,000 had not been repaid.

Mr. Harding's evidence was a pathetic attempt to assist the accused. According to him the bank made no effort to secure the promised title even after the date for its delivery as stated in the letter of undertaking had passed. This he said was because there was other collateral making this title really extra though not quite unnecessary. Interestingly, he does not know of the letter signed by Miss Ellington – the one the accused said was brought to her attention by a telephone call from the bank.

Mr. Harding was ever so ready and willing to transform this undertaking to give title into an undertaking to pay a sum of $230,000. According to Mr. Harding, Mr. Allen gave instructions for the repayment to him of this $230,000 and actually encouraged him to get the money from the accused. Yet when his instructions were followed and he came asking about the origin of this credit to his account, he at no time reminded Mr. Allen of his instructions but flatly refused to provide Mr. Allen with the information he sought. It took a Court Order for Mr. Allen to get the information from the bank about a credit to his own account.

Counsel for the prosecution quite rightly suggested to Mr. Harding that he was part of a scheme to represent the $230,000 as a refund paid into Mr. Allen's account. He denied that he assisted the accused in paying back the money to Mr. Allen and said it was rubbish to suggest that that is why he would not disclose to Mr. Allen the source of the credit. That would be a fitting description for the explanation he gave as to why he did not make the disclosure even after the police intervention. I find that Mr. Allen only became aware of the credit when he received his bank statement. This 'repayment' was a contrivance between the accused and Mr. Harding.

His effort to assist the accused ran into difficulties when he recalled her telling him that the transaction had fallen through because the vendor had sold the land to more than one person. She claims that he is mistaken but at no stage did she say what she told him which may have led to that mistake. She appears not to have told him that the vendor was dead and that the transaction could not be

> completed or that completion would be delayed indefinitely. It may well be that he became involved in this deception because she told him about a dual sale transaction requiring this one to be terminated."

The learned Resident Magistrate's findings in this regard are amply supported by the evidence and cannot be disturbed.

Mr. Ramsay, Q.C. also contended that there was no evidence that the complainant was induced to purchase the land by the false pretences made to him, but that he entered into the agreement because he liked the land. This submission is obviously without merit. There was an abundance of evidence that the complainant would not have entered into the agreement had he not been told that the proposed vendor was alive, and was coming to Jamaica to sign the Agreement. Nor would he have done so had he known that the appellant had no authority to sell the land, and could not effect a transfer to him having regard to all the existing circumstances.

Mr. Ramsay's final point that there was no evidence that the appellant intended to deprive the complainant wholly of his funds goes contrary to the evidence in the case. She accepted payments, insisted on speedy payments and thereafter did nothing in an attempt to effect the execution of the Agreement. She could not do anything given the state of affairs, which were well within her knowledge. On the evidence it was open to the Court, particularly given her conduct as revealed in the Crown's case, to infer that she in fact intended to deprive the complainant wholly of his property.

For these reasons, we dismissed the appeal.