**[2020] JMCA Crim 38**

**JAMAICA**

**IN THE COURT OF APPEAL**

**PARISH COURT CRIMINAL APPEAL NO COA2019PCCR00007**

**BEFORE: THE HON MR JUSTICE BROOKS JA**
**THE HON MRS JUSTICE SINCLAIR-HAYNES JA**
**THE HON MISS JUSTICE STRAW JA**

**ALISTAIR MCDONALD v R**

**Kent Pantry QC and Ms Deborah Martin for the appellant**

**Mrs Caroline Hay QC and Richard Small (by fiat from the Director of Public Prosecutions), Mrs Yanique Gardener-Brown and Hodine Williams for the Crown**

**9, 10, 11, 12 June and 25 September 2020**

**BROOKS JA**

[1] On 21 July 2014, Mr Alistair McDonald was convicted on 20 counts of an indictment. The convictions were for the following offences:

Falsification of Accounts – 9 counts

Larceny – 11 counts

The learned Resident Magistrate (as the judicial officer was then called), before whom he was convicted, sentenced Mr McDonald, on 8 September 2014, to 18 months'

imprisonment at hard labour on each count. She ordered that the sentences should run concurrently.

[2] The prosecution's case at the trial was that Mr McDonald committed all those offences against Key Insurance Company Limited (Key Insurance), to which he was employed. The offences are said to have been committed over a period of approximately five years, that is, from 2004 – 2009.

[3] Mr McDonald has appealed against the convictions and the sentences. The major issues raised by his grounds of appeal against the convictions concern:

a. the production, or non-production, as the case may be, of evidence by the prosecution; and

b. the cogency of the circumstantial evidence, and the manner in which the learned Resident Magistrate treated with it.

**The prosecution's case**

[4] Key Insurance provides general insurance coverage to the public. Its business includes a motor vehicle insurance portfolio. From time to time, its insured would make claims for indemnity for losses arising from motor vehicle collisions and crashes (hereafter called "accidents"). In many cases, there were third parties who had either suffered property loss and/or bodily injury at the time of the accident. Key Insurance would create a file for each claim for indemnity. All claims for compensation arising

from that accident, whether made by the insured or by a third party, would be included in that file.

[5] The prosecution alleges that a fraudulent scheme was utilised to defraud Key Insurance, which, by the time it was discovered, had cost Key Insurance approximately $39,000,000.00. The scheme involved adding fraudulent claims for compensation to genuine claim files. The fraudulent claims would involve the use of fictitious third parties. Key Insurance would draw cheques to pay those fraudulent claims and the cheques would be negotiated by a party to the fraud.

[6] The prosecution alleges that Mr McDonald, then an assistant general manager of Key Insurance, is a party to the fraud. It asserts that, not only did he, as one of Key Insurance's claims negotiators, approve all those fraudulent claims, but all the cheques that were fraudulently acquired from Key Insurance, were either lodged to a bank account operated by his company, Croft's Hill Company Limited (CHC), or negotiated by him at a foreign exchange cambio, named U2 Connect Communication Limited (U2). There were therefore, on the prosecution's case, two separate offences in respect of each fictitious claim, namely the making of a false entry in the insurance claim, and, secondly, a stealing of the compensation cheque.

[7] The prosecution's case is built around 17 files (exhibits 2-18), in each of which it sought to demonstrate the elements of the fraud. Each case involved a fraudulent medical report. The elements of fraud in the various cases included:

a. a "doctor" who was not known to the medical centre from which the report was said to emanate;

b. a "doctor" who was not registered with the Medical Council of Jamaica; or

c. a "report" from a non-existent medical centre.

In several cases, the medical reports had common features, including, the same format, font, and most prominently, the misspelling of the word "examination", which was produced as "eximination".

[8] It was Mr McDonald's duty, the prosecution asserts, to protect Key Insurance by identifying such anomalies and weeding out false claims. The multitude of cases involving this convergence of circumstances, the prosecution contends, meant that complicity, and not happenstance, was the cause of those false claims being approved.

[9] The record indicates that the prosecution proffered 23 counts against Mr McDonald. Each count for falsification of accounts had a counterpart for larceny of a cheque in the same amount. That situation applied to counts 1 through 20, that is, counts 1 – 10 were for falsification of accounts and counts 11 - 20 for larceny. At the trial, the prosecution did not proceed with counts 1 and 11.

[10] Count 21 is a charge for larceny. It did not have an associated falsification of accounts count. The prosecution adduced no evidence in respect of that count.

[11] For count 22 of the indictment, however, the prosecution's case is different. The prosecution produced 104 Key Insurance cheques, which it said that it could not link to

a claim file. Two of those cheques were eventually accounted for during the trial. All those cheques had been either lodged to CHC's account or negotiated by Mr McDonald at U2. The prosecution asserts that this multitude of cheques was produced by the same fraudulent process described above. It sought to provide an explanation for the absence of proof of the falsification of accounts element in respect of those cheques. A prosecution witness testified that Mr McDonald, when confronted with the revelation of the scheme, stated that he had destroyed all the claim files.

[12] In the early stages of the trial, however, the prosecution said that it had discovered a few additional claim files. One of those files, it said, is associated with one of the cheques forming part of count 22. Accordingly, the prosecution added another count, count 23, to the indictment. It was for falsification of accounts.

[13] Uncertainty surrounds the outcome of count 23. The learned judge considered it in her reasons for judgment and found Mr McDonald guilty on it. The record of appeal, however, does not contain a copy of the indictment that includes that count. The endorsement on the indictment that has been produced to this court does not record Mr McDonald as having been convicted of that count.

**The defence**

[14] Mr McDonald made a five-hour long unsworn statement in his defence. In it, he accepts that there was a fraudulent scheme. He, however, denies being a part of the deception. He insists that any approval of claims by him would have been done in the normal course of the claims process. That process, he said, involved Key Insurance's

claims handlers receiving documentation and proof of identification from claimants, preparing the claims, and submitting them to him, and the other claims negotiators, for approval. He contended that he did not have autonomy in the approval process and that, before he approved any claim, it would have had to have been previously approved by a general manager at Key Insurance, or by Mr Sunny Gobin, who was Key Insurance's then principal.

[15] He accepts that he should have noticed these anomalies that became apparent from the prosecution's presentation of the case. He, however, asserted that since the fraudulent claims did not come to him in close proximity to each other, the dishonesty was not apparent in the day to day operation. He would, therefore, not have seen the similarities in the cases, so as to alarm him or even to put him on the alert.

[16] He said that the fact that he was, for a significant portion of the relevant time, only in office for two days for each week, made him rely more on the claim handlers' processing of the documents. He stressed the existence and contents of an office memorandum that he had sent to the staff of the claims department. It set out his method of operation during those limited periods in office. That memorandum was admitted into evidence as exhibit 19. It confirms, he said, that because he was in office for such a limited period of time, he only saw claimants by appointment, and it was for the claim handlers to set those appointments ahead of time.

[17] In respect of the cheques being negotiated by him, he states that he operated a cheque cashing business to supplement his income. He did so, albeit at a fee, as a

service to Key Insurance's payees, who found it inconvenient, for one reason or another, to negotiate the compensation cheque at a bank. He even cashed cheques, he said, for fellow employees at Key Insurance. He accepted that it was against Key Insurance's policy to negotiate payee cheques on its premises, but asserts that he did not do so as part of a fraudulent scheme.

[18] As far as count 22 is concerned, Mr McDonald sought to demonstrate that the prosecution's case was based on speculation. He said that he specifically remembered two of the cheques forming part of that count. This is because the payees were mechanics who had worked on his motor car. The car, he said, was maintained at Key Insurance's cost, and it paid the amounts charged by the mechanics. Key Insurance would only pay by cheque, however, and the mechanics neither wanted to wait for payment, nor wanted payment by cheque. As a result, Mr McDonald said, he advanced the payment, in cash, and when the cheques were produced, the mechanics endorsed them over to him. He denied ever having told anyone that he had destroyed claim files.

[19] Mr McDonald asserted that the case against him was contrived by employees at Key Insurance who were envious of his close relationship with Mr Gobin.

[20] Defence counsel, on his behalf, criticised the presentation of the case by the prosecution. Learned Queen's Counsel criticised the belated production of additional files and other material during the course of the trial. He was scathing of the prosecution's failure to produce relevant documentation that would have been in Key Insurance's possession, and which would have assisted the defence. He specifically

identified, in respect of the count 22 cheques, the failure to produce the cheque stubs, Mr McDonald's appointment book and, critically, the cheque receipt register that each payee was required to sign.

**The grounds of appeal**

[21] Mr McDonald filed two original and eight supplemental grounds of appeal. The original grounds state:

> "1. The Learned Resident Magistrate failed to properly deal with the law on circumstantial evidence and to properly apply the law to the evidence;
>
> 2. The Learned Resident Magistrate erred in fact and law and the verdict is unreasonable and cannot be supported by the evidence."

Original ground one was incorporated into and argued as part of supplemental ground two. Original ground two was argued as a separate ground.

[22] The supplemental grounds are:

> "**Ground 1**
>
> That the Learned Trial Judge (LTJ) erred when she;
>
> 1. Permitted the prosecution to adduce fresh material during the trial and to rely on said material in proof of their case which had not been hitherto disclosed to the Defence prior to the commencement of trial, and
>
> 2. In permitting the crown to withhold material in their possession and/or under their control that was vital to the defence during and up to the end of the evidence being adduced in the trial.
>
> This non and/or late disclosure included material that was relevant to the Exhibits 21A-BP, Exhibits 23A-N, Exhibits 24A-l and Exhibit 25A-C (one hundred and two [(]102[)]

cheques) which were the subject of Count 22, and material relevant to [Mr McDonald's] account of events as detailed Exhibit 19 (his Memo) and material relevant to whether payees had signed for the cheques relied on by the Crown in proof of fraud charges for Larceny of said cheques in the Indictment.

Furthermore, the Learned Trial Judge made specific findings that were adverse to the Appellant when assessing the evidence in the absence of the requested and denied material.

That this failure was fundamental to and denied the Appellant an essential facility necessary to his fair trial.

**Ground 2**

That the Learned Trial Judge failed to demonstrate that she had properly directed herself on the law relating to circumstantial evidence and furthermore, she failed to demonstrate how she resolved;

1. the inherent weaknesses within the Crown's case,

2. the impact of evidence that arose in direct contradiction of the Crown's theories,

3. the several lacunae created on the Crown's case on account of non disclosure of relevant and requested material, and

4. the issues that arose concerning the credibility of Charlton Hylton

before arriving at her verdict of Guilty of the several counts based on the circumstantial evidence in the case.

That her non-directions amounted to misdirection for which the verdicts should be set aside and the convictions quashed.

**Ground 3**

That Count 22 of the Indictment is bad for duplicity as this single count charged the Appellant with theft of one hundred and two [(]102[)] separate cheques on one hundred and

two [(]102[)] separate dates to one hundred and two [(]102[)] separate payees and hence should be treated as null.
Wherefore it is submitted that the conviction on that count should be quashed and the sentence set aside.

**Ground 4**

That the Learned Trial Judge erred in relying on the contents of Exhibits 2-18 in arriving at a verdict adverse to the Appellant as they consisted of hearsay material not proven to be true as;

1. None of the victims, subjects of the alleged accidents detailed in the exhibited files, were called by the prosecution to speak of their own knowledge as to the contents of the file in so far as this was relevant to the truth of the contents of the exhibited files.

2. Neither did the prosecution adduce evidence as to their unavailability so as to cause a Court to rely on the contents of the hearsay documents.

3. The producer of the exhibited files, the witness Heather Bowie, admitted that she was the mere custodian of the records for the purpose of bringing them to Court and could not speak of their contents based on her own knowledge and/or recollection prior to reading their contents. Furthermore, she was allowed to read the contents from the documents and the Crown allowed to rely on said contents in order to provide evidence relating to relevance and admissibility before the ruling as to their admission as Exhibits and thereafter, to introduce their contents into the evidence.

That these errors allowed the receipt into evidence of hearsay material outside of the circumstances permitted by virtue of Sec 31 of the Evidence Act and/or any of the other exceptions to the hearsay rule and allowed the witness to advance material independently of her own experience and/or ability to recall as her evidence.

**Ground 5**

That the Learned Trial Judge erred in allowing several witnesses to rely on the contents of Exhibit 2-18 to provide a significant part of their evidence in chief as to their own actions in circumstances where they presented contents of the documents and not their independent recall was the basis of their evidence in chief. The witnesses often adopted the record when presented hence relying on those contents in circumstances where they did not even ask to refresh their memories or had not been challenged as to prior inconsistencies.

That allowing a witness when giving evidence in chief to rely on material that is not in their own statement or from their independent recall is a material irregularity and so egregious as to render their evidence in chief of nugatory value.

**Ground 6**

That the Leaned Trial Judge erred in receiving and in relying on the opinion evidence of Carlton [sic] Hylton as;

1. He was neither asked if he was nor has it been demonstrated that he is an expert in his field and hence competent to give expert opinion,

2. He has not produced all the material on which he relied to form his expert opinion so as to allow the Court to assess his opinion and make its own independent finding as to its consistency or not with all the data he purportedly examined,

3. He has not adequately explained his methodology in coming to his opinion so as to allow the court to make its own assessment and findings as to the weight to be attached to the opinion in light of the Crown's burden and standard of proof.

That this failure to recognize and treat with this witness as an expert before allowing him to give his opinion and in relying on his opinion in coming to findings and verdicts adverse to [Mr McDonald] is so prejudicial as to render the verdicts unsafe: they should be quashed and the verdicts set aside.

**Ground 7**

That the Learned Trial Judge erred in relying on the contents of Exhibit 20 A-C which came from the witness Calvert Asphall as he had conceded that;

1. It had the input of persons not named and hence not known to the Court,

2. The documents were conceded by the witness to be incomplete and the witness could not confirm the integrity or veracity of the contents inputted by others who had working access to the spread sheet,

Whilst Sec 31G of the Evidence Act permits the receiving into evidence of computer generated material, the requirements [are] not met merely by stating that the content is generated by a computer. There are further requirements as to the source of the contents of the material generated by the computer which had not been satisfied and hence its truth and/or credibly could not have been properly assessed prior to making adverse findings against [Mr McDonald].

**Sentencing**

**Ground 8**

[Mr McDonald] was sentenced on the 8th day of September, 2014 to eighteen [(]18[)] months' imprisonment on each count and that all sentences were to run concurrently: verbal Notice of Appeal was given on that day. Thereafter, there was a delay of six [(]6[)] years in obtaining the full record of the Parish Court.

That having regard to the inordinate delay of over six [(]6[)] years between his sentencing by the Learned Trial Judge and the receiving of the record of the Parish Court, which constituted a breach of [Mr McDonald's] right to have his matter heard within a reasonable time, the portion of his sentence that mandates imprisonment should be set aside."

The grounds will be considered separately below.

[23] Mr Pantry QC appeared in this court for Mr McDonald, as he did in the court below. He argued supplementary grounds 1 and 2 and the original ground 2 on behalf of Mr McDonald. Ms Martin, appearing with Mr Pantry, argued supplemental grounds 3-8. For the Crown, Mrs Hay QC argued supplemental grounds 1 and 2, original ground 2 and supplemental grounds 3- 7, and Mr Small argued ground 8.

**The disclosure issue (supplemental ground 1)**

[24] Mr Pantry accepted that the prosecution, in discharging its obligation to make full disclosure, was permitted to make further disclosure after a trial had started. He submitted, however, that the manner in which the disclosure was done in this case, and the failure to disclose critical documents, worked severe prejudice on Mr McDonald's defence. He argued that the prejudice was pointedly demonstrated when the learned Resident Magistrate used the absence of the material against Mr McDonald.

[25] Learned Queen's Counsel pointed to certain breaches of the principle of disclosure, which, he submitted, the prosecution committed. He said that there was late disclosure and non-disclosure. Neither of which, he submitted, was excusable in this case.

[26] There were a number of instances of late disclosure, Mr Pantry argued. These all occurred during the trial:

1. six claim files were produced after the trial started, that is, on the second day of trial;

2. the evidence by a prosecution witness, Mr Seraj Daniels, concerning material that was not previously disclosed;
3. an email that a prosecution witness, Mr Calvert Asphall, a consultant that Key Insurance had engaged, had sent to Mr Charlton Hylton, Key Insurance's Financial Controller; and
4. the exhibit 19 memorandum that Mr McDonald had penned to the Claims Department's staff.

[27] The non-disclosure, Mr Pantry submitted, was critical. Learned Queen's Counsel argued that there were at least three documents that were critical to the defence, and the prosecution failed to produce them. They were, he said, Mr McDonald's appointment book, the cheque receipt register, and the cheque stubs for the count 22 cheques. Mr Pantry argued that the learned Resident Magistrate, not only failed to appreciate the significance of the non-disclosure, but aggravated the situation when she stated, at page 511 of the record of appeal, that there was no evidence that an appointment book was ever kept.

[28] Mr Pantry relied, in part, on the authorities of **Linton Berry v The Queen** [1992] UKPC 16; [1992] 3 WLR 153 and **Harry Daley v R** [2013] JMCA Crim 14, in support of his submissions.

[29] Mrs Hay stoutly refuted these complaints. She accepted that there were late disclosures but stated that the material only came to the hands of prosecuting counsel, of which she was one, after the trial had started. She contended that the prosecution's duty of disclosure is an ongoing one, and the material was produced as it was found or was requested. The late disclosure, she submitted, did not cause any prejudice to the defence, and did not lead to an unfair trial.

[30] The material from the six files, learned Queen's Counsel submitted, was not the subject of evidence, or the addition of count 23, until approximately four months after that disclosure. There was ample time, she submitted, for the defence to prepare for cross-examination in respect of that material. Other material, she submitted, was unearthed as cross-examination by the defence counsel indicated that it was relevant. She submitted that the timing of that disclosure was not the subject of complaint during the trial.

[31] In respect of the non-disclosure, Mrs Hay submitted that there was no request by the defence for the material that Mr Pantry complained about in his submissions. The complaints about non-disclosure, learned Queen's Counsel argued, were first made during closing submissions. She said that there was no prior request for the cheque register, appointment book or cheque stubs.

[32] In analysing the complaints in this ground, and the competing submissions of learned Queen's Counsel, it must be borne in mind, that this court, in **Harry Daley v R**, pointed out that the term "prosecution" is not limited to counsel appearing, but also

includes the investigative team. Panton P, in delivering the judgment of the court, said, in part, at paragraph [49]:

> '"The prosecution' means not just the prosecutors who appear in court but includes persons such as police officers and other state officials connected with the investigation and conduct of the case against the accused person."

[33] Having said that, it cannot, however, be expected that in cases such as this, the prosecution could be expected to produce every document in a complainant's possession. The requirement is to disclose all relevant material. In the event that the defence requires additional material that has not been provided, then it must request it. Once that material is disclosed, the defence must be afforded an opportunity to examine it and to recall, for cross-examination on that material, any witness whose testimony is affected thereby.

[34] The prosecution's ongoing duty of disclosure is also relevant in this context. If, after prior disclosure, the prosecution secures additional relevant material, it bears a duty to disclose that material, of its own volition, to the defence.

[35] There has been no dispute between counsel as to the applicable principles. The issue is whether Mr McDonald's case was prejudiced by either late disclosure or non-disclosure by the prosecution. Mr Pantry has not demonstrated that there has been such prejudice.

[36] The points to be made in respect of the late disclosure are:

a. as Mrs Hay has pointed out, the production of the six files was done long before the cross-examination begun in respect of the important witness, Mrs Bowie, through whom the majority of the claim files were adduced into evidence;

b. the additional statement of Mr Daniels, which was given after the trial commenced, was disclosed to the defence before he gave evidence and did not prevent cross-examination by defence counsel (see page 179 of the record of proceedings);

c. the information in the email from Mr Asphall to Mr Hylton had been disclosed to the defence prior to the start of the trial, and this was pointed out to the court and defence counsel, as is recorded at page 287 of the record of proceedings; and

d. exhibit 19 was produced upon the request of the defence, as were other documents as they proved to be relevant, but there was no indication during the trial that there was any prejudice to the defence as a result of the late disclosure.

[37] The complaints about non-disclosure are similarly without a solid basis. As Mrs Hay has submitted, there was no application by the defence, during the presentation of

the prosecution's case, for the production of the items that Mr Pantry complained about during closing submissions in the court below and in this court. It is true that they were the subject of cross-examination and could have put the prosecution on enquiry to find them. Indeed, there was an occasion where disclosure of documents was made based on the fact that there was cross-examination regarding them. The principle, however, is whether the defence was prejudiced by the non-disclosure. That has not been demonstrated.

**The treatment of the circumstantial evidence (original ground 1 and supplemental ground 2)**

[38] The learned Resident Magistrate identified, at page 506 of the record of proceedings, that the case involved the use of circumstantial evidence. She reminded herself of the nature of circumstantial evidence and of the points that she was required to examine before arriving at a decision. After correctly reminding herself of the burden and standard of proof in respect of circumstantial evidence, the learned Resident Magistrate completed her review of the law with regard to circumstantial evidence with a similarly correct outline of the principles of that law. She said, in part, at page 507 of the record:

> "Before I can rely on circumstantial evidence to conclude that a fact necessary to find [Mr McDonald] guilty has been proved, I must be convinced that the Prosecution has proven each fact essential to that conclusion beyond a reasonable doubt. Also, before I can rely on circumstantial evidence to find the defendant guilty, I must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that [Mr McDonald] is guilty. If I can draw two or more reasonable conclusions from the circumstantial evidence; and one of those reasonable conclusions from the circumstantial evidence points to

> innocence and another to guilt, I must accept the one that points to innocence. However, when considering circumstantial evidence, I must accept only reasonable conclusions and reject any that are unreasonable. I must also have regard to the fact that the law makes no distinction between the weights given to either direct or circumstantial evidence."

[39] Mr Pantry submitted that the learned Resident Magistrate handled the relevant law in a terse manner and she did not adequately treat with the circumstantial evidence sufficiently closely to arrive at an appropriate conclusion. In particular, learned Queen's Counsel submitted, that the learned Resident Magistrate did not expressly remind herself that the circumstances must be examined narrowly. With regard to the relevant evidence, learned Queen's Counsel submitted that the learned Resident Magistrate failed to mention in her judgment, a number of obvious weaknesses in the prosecution's case.

[40] Among the weaknesses, Mr Pantry submitted, were:

a. the absent documents, namely, the cheque receipt register, and the appointment book;

b. the absence of any incriminating material from Mr McDonald's desktop computer from work, or his personal desktop, and laptop computers and thumb drive that the police took from his home;

c. the implication from the improper inclusion of the cheques to the two mechanics that Mr Hylton had

"rushed to judgment" in accusing Mr McDonald of dishonesty, merely because Key Insurance cheques had been lodged to his company's accounts;

d. the evidence that Mr McDonald cashed cheques for employees at Key Insurance; and

e. the inexplicable failure by Mr Hylton to include in his first statement to the police, his allegation that Mr McDonald had admitted to him that he had destroyed claim files.

These weaknesses, Mr Pantry submitted, "resulted in an unfair trial and hence a miscarriage of justice".

[41] Mr Pantry relied on a number of cases in support of his submissions, including **Brian Bernal and Christopher Moore v R** (1996) 50 WIR 296 and **McGreevy v Director of Public Prosecutions** [1973] 1 All ER 503.

[42] Mrs Hay argued that there was no defect in the learned Resident Magistrate's outline of the relevant law regarding circumstantial evidence and the learned Resident Magistrate conducted a sufficient analysis of the evidence to demonstrate that she properly considered the evidence, including the weaknesses in the prosecution's case.

[43] Mr Pantry is not on good ground with his submission in respect of the learned Resident Magistrate's direction to herself on the law of circumstantial evidence. This court has long approved the principle in **McGreevy v Director of Public**

**Prosecutions**, concerning directions in law in cases involving circumstantial evidence. It is that there are no special directions required in such cases. This was concisely set out in **Melody Baugh-Pellinen v R** [2011] JMCA Crim 26, at paragraph [40]:

> "There is therefore no rule requiring a special direction in cases in which the prosecution places reliance either wholly or in part on circumstantial evidence. This was confirmed by this court in **Loretta Brissett v R** (SCCA No. 69/2002, judgment delivered 20 December 2004) and **Wayne Ricketts v R** (SCCA No. 61/2006, judgment delivered 3 October 2008), in both of which **McGreevy** was cited with approval." (Emphasis as in original)

The learned Resident Magistrate's directions, quoted above, along with her directions to herself on the burden and standard of proof, are adequate directions for the case.

[44] Mr Pantry also requires a higher standard from the learned Resident Magistrate than the statute requires. Section 291 of the Judicature (Resident Magistrates) Act, now the Judicature (Parish Court) Act, stipulates that the Resident Magistrate is to make a record of his or her findings of fact, arising from the trial. That requirement has been assessed by this court on a number of occasions, but quite thoroughly in **Brian Bernal and Christopher Moore v R**. In that case Forte JA, as he then was, outlined a Resident Magistrate's duty in this respect, at pages 315-316, by approving a statement thereon by Carey P (Ag), as he then was, in **R v Chuck** (1991) 28 JLR 422, at page 432-433:

> "Before examining the findings of the resident magistrate to determine the merit of this contention it is necessary to look at his duty in this respect. This is set out in section 291 of the Judicature (Resident Magistrates) Act which, in so far as is relevant, states:

'Where any person charged before a court with any offence specified by the Minister, by order, to be an offence to which this paragraph shall apply, is found guilty of such an offence, **the magistrate shall record or cause to be recorded in the notes of evidence, a statement in summary form of his findings of fact on which the verdict of guilty is founded**.'

This court (*per* Carey JA) in *R v Chuck* (1991) (unreported) explained the section as follows:

**'Our firm conclusion is that a resident magistrate satisfies the provisions of section 291 by recording in a summary form, findings of fact which go to prove the guilt of the accused. Where there is conflicting evidence between Crown witnesses, he should state whose evidence he accepts and whose he rejects. In that case, it is expected that some reason or explanation for the choice will be shortly stated. If a conclusion is derived from inferences then the primary facts from which the inference or inferences are drawn should be stated.** Findings in a summary form is not a licence for laconic statements, and we would think that clarity in expression is an advantage. The language therefore in which the findings are couched should demonstrate an awareness of the legal principles which are involved in the case. **If he must warn himself, the findings should show he has done so**.' (Emphasis supplied)

[45] Downer JA, in **Brian Bernal and Christopher Moore v R**, also carefully analysed the requirements of section 291 and, after referring to other decided cases, addressed a complaint that is reminiscent of Mr Pantry's complaint in this case. Downer JA stated at pages 366-367:

"Mr [Richard] Small initially contended that reasons ought to be required as in the case of a Supreme Court judge sitting

> without a jury and cited *R v Simpson and Powell* [1993] 3 LRC 631. That submission ignored the different requirements imposed on a resident magistrate recording his findings of fact in a summary manner, a Supreme Court judge summing-up to a jury, or exceptionally delivering his reasons for judgment in a criminal trial, where (as in the Gun Court) he sits without a jury. There are of course, instances when a resident magistrate in recording his findings of fact must show by the manner in which he records those facts that he is aware that the evidence necessary to find a verdict of 'Guilty' is in a special category, as in the case of identification evidence. There was no such requirement in this case...."

[46] The learned Resident Magistrate's analysis of the evidence in this case cannot be faulted. She, quite correctly, set out the undisputed areas of the evidence and concluded from that outline that all the actions associated with the offences, that are required to be proved, had been proved, namely, in respect of the falsification of accounts:

a. Mr McDonald's employment to Key Insurance;

b. the entries into Key Insurance's records of the claims;

c. Mr McDonald's making of those entries; and

d. the falsity of the entries.

In respect of the larceny:

a. Mr McDonald's employment to Key Insurance;

b. the cheques belonging to Key Insurance;

c. the removal of those cheques from Key Insurance's premises;

d. Mr McDonald's handling of each of the cheques thereafter; and

e. the intention to permanently deprive.

[47] The learned Resident Magistrate found that the only disputed area in the elements to be proved for each offence is the mental element of dishonesty. She said, in part at page 514 of the record of proceedings:

> "Thus far my review of the evidence has disclosed that the ingredients of the offence [sic] have been proved by the prosecution save the mental element which I will go on to consider below. That is to say 'fraudulently and without a claim of right made in good faith' as it relates to the larceny charge and a wilful intention to defraud as it relates to the charges of falsification of accounts. The only element disputed in relation to each charge is the mens rea of Mr McDonald. This must of course be established by the Crown and where not specifically revealed by [Mr McDonald] can be inferred by my jury mind where the evidence so allows."

[48] As far as the learned Resident Magistrate's jury mind is concerned, it is to be noted that the learned editors of Archbold, Criminal Pleading, Evidence and Practice in Criminal Cases, 36th edition, stated at paragraph 2075 in respect of the offence of falsification of accounts:

> "…The intent to defraud would probably be implied by the jury if they were satisfied of the wilful false entry or omission…The proof of other facts, however, might render such implication irresistible…
>
> A person may be guilty of making a false entry…although he does not make such entry with his own hands, but fraudulently and wilfully procures it to be made by a third person acting innocently and without any knowledge that the entry is otherwise than true…"

[49] The learned Resident Magistrate did apply her jury mind to the evidence. She conducted a careful and commendable examination of the testimony of all 26 witnesses for the prosecution and accepted that they had all been truthful in their testimony. She accepted in particular the evidence of Mr Hylton, that Mr McDonald made a "veiled admission" (page 539 of the record) to him during a meeting between them, by saying that the taking of money ceased in July 2009 and that he (Mr McDonald) had destroyed the claim files. By contrast, the learned Resident Magistrate rejected Mr McDonald's unsworn statement and noted in particular that it contained several items of new material that had not been suggested to the prosecution's witnesses to get their responses.

[50] She then made a number of findings of fact, satisfying the requirements of section 291 of the Judicature (Resident Magistrates) Act, as explained by Forte and Downer JJA. She said, at pages 540-543 of the record of proceedings (which are set out in full to demonstrate the learned Resident Magistrate's awareness of her duty):

> "1. Bearing in mind that the burden of proof rests on the prosecution and the standard of proof is beyond a reasonable doubt. Against that background I have given much consideration to [Mr McDonald's] unsworn statement. I have kept in mind the good character directions I had accorded to him, and after taking all of the crown's evidence into account; I have weighed his credibility and found him wanting. His dock statement for the most part was fraught with proven inconsistencies and untruths. As such I have rejected [Mr McDonald's] statement in so far as he seeks to deny the allegations contained in the indictment, I do not find him to be a truthful person and I say this; being ever conscious that he bears no burden of proof.

2. I have contemplated the evidence of all twenty-six (26) witnesses offered by the Crown; I have considered them individually and collectively and I regard them as truthful witnesses and their evidence as credible. I am satisfied so that I feel sure that none had any ulterior motives and were not attempting to divert blame from themselves. I have also contemplated the documentary evidence led in the case and I find it also to be credible and supportive of the charges brought against [Mr McDonald] except as it relates to count 21.

3 I find as a matter of fact that the complainant Key Insurance Company Limited (Key) is a general insurance company, underwriting risk to property and person. That at all material time the Accused Alastair [sic] McDonald was a clerk or servant of [Key] Insurance Company Limited and worked in the Claims Department between the years 2004-2009. That Mr McDonald's primary function as Claims Negotiator; was to negotiate and settle third party personal injury claims and approve payments; and in executing these functions he was autonomous.

4. I find as a matter of fact that beginning in 2004 and extending into 2009, Alastair [sic] McDonald created fictitious 'third parties' and added them as participants to genuine claims made to Key by its insured. That he used his access to Key's claim records and his authority to engage Key's cheque requisition systems and procedures in order to obtain cheques made payable to third parties whose existence in each and every case, (except where otherwise indicated) I find to be fictitious. In each and every such case, [Mr McDonald] either lodged or concurred in the receipt of the cheques into his bank account held at First Global Bank Jamaica Limited account number 1024520 or encashed the cheques at U2 Connect Communication Cambio.

5. I find that direct evidence of falseness of a claim is proved in relation to counts 2— 10 and 23; where the physical files were found. In the files which have been located, Third Party Release documents are allegedly signed by the parties and witnessed by [Mr McDonald],

there is always some fiction identified in these claims; either the doctor's name is denied as a Registered Medical Practitioner by the Medical Council of Jamaica, or the place where the party was examined does not exist, or the name of the doctor is not known to the centre from which he is said to operate and the patient's name cannot be verified from the records. The drivers involved in the accidents deny that the payee was involved or associated with the accident. In all cases where files have been located, the claimants have not been found by the police. In the circumstances I find that in respect of all these claims that Alastair [sic] McDonald processed, he concurred in the making of a false entry in Key's files that is to say the named persons exist, they made claims against Key Insurance and that they had agreed to collect monies in settlement of their claims and this is all a lie.

6. I find that by extension the corresponding counts 12--20 are established to my satisfaction as all cheques generated from the fictitious claims were not obtained by claim of right made in good faith. On the contrary I find that the cheques came into the possession of [Mr McDonald] by dishonest means and that he asported them with the intention to permanently deprive Key of its valuable securities. This intention is grounded on the proven fact that the cheques were removed from the premises of Key to either First Global Bank or U2 Connect Communications Cambio in either Clarendon or Manchester by or on behalf of Alastair [sic] McDonald and the sums of money were debited from the Complainant's bank account(s).

7. I find that even where no files are found as was substantially the case in count 22; the larceny is nonetheless proved by circumstantial evidence. The evidence has satisfied me so that I feel sure that there was no other business activity or process within Key to explain the existence of the cheques in count 22 other than they purportedly represent payments to persons making claims on Key's insured. Additionally, there was only one defined way for which cheques made payable to Third Party Claimants could come into existence and It [sic] is the prosecution's case that those cheques could

only have been obtained by Alastair [sic] McDonald from his representations that these were all genuine settlement of claims and I find that this is so. Given Alastair [sic] McDonald's association with them all, I draw the irresistible inference that he followed the same or similar modus operandi that is alleged in the cases where files were located.

8. There were no paper files to prove directly that the moiety [sic] of cheques in count 22 were generate [sic] from false claims and consequently stolen; but I am satisfied so that I feel sure that the circumstantial evidence presented by the Crown lead irresistibly to this conclusion and to no other reasonable conclusion and is entirely inconsistent with [Mr McDonald's] innocence. The evidence I contemplated in this regard includes but is not limited to the following:

    - The evidence contained in Exhibits 20A to 20E which gives all the details required to demonstrate Mr. McDonald's association with each of these cheques and how they came into existence.
    - [Mr] McDonald's explanation given to Miss McLeod at U2 Connect that he was a [businessman] and he obtained the cheques from persons who wanted to purchase vehicle parts. I contrast this with what he says in the Q&A that he did not know any of the payees shown to him on the list, (this must be because such payees do not exist) I find his assertion to be an implied admission of guilt
    - Having accepted Mr. Hylton as a credible and reliable witness; I find that the only explanation there is for Mr. McDonald being able to say to him that the files were destroyed was because he destroyed them and this would also be evidence supportive of his guilt; only a guilty person would want to suppress or destroy evidence that could implicate him.
    - [Mr McDonald] attempted to deny his autonomy and insulate himself from any accountability and by extension criminal liability. He was in this regard severely

discredited by the inconsistent answer in the Q&A and even in his own dock statement.

9. Relying upon the totality of the evidence I am satisfied so that I feel sure that Alastair [sic] McDonald stole the valuable securities set out in the schedule of Count 22 with the exceptions of the following:

| **Name of Payee** | **Exhibit No.** | **Cheque No.** |
|---|---|---|
| - Frederick Anderson | 21BQ | 6000814 |
| - Winston Gardner | 21 BR | 5095311 |

Based on my reasons previously indicated I find [Mr McDonald] guilty on counts 2-10; 12 — 20, 22 (with the excepted portions as indicated); and count 23. I find him not guilty on count 21."

[51] The "weaknesses" to which Mr Pantry points, cannot diminish the strength of that powerful evidence, as found by the learned Resident Magistrate. The assessment of the evidence reveals that:

a. the absence of the cheque register and the appointment book would, at best, show that Mr McDonald worked alongside someone else who attended to collect the cheques, which resulted from the false claims;

b. the absence of any relevant material on his computers, similarly, does not provide an indication of lack of involvement in the scam;

c. whereas the cheques for the mechanics do show a "lumping together" of all cheques passing through Mr McDonald's hands, there is an evidential burden that passes to him to explain those transactions, which he discharged in two of the one hundred and two cases forming part or count 22;

d. the cashing of cheques for Mrs Bowie and her husband, cannot overturn the mass of evidence in respect of the prosecution's case; and

e. the learned Resident Magistrate expressly found that Mr Hylton's statement about the meeting with Mr McDonald, and the statements made by Mr McDonald, were not recent concoctions and she gave her reasons for saying so; specifically finding Mr Hylton to be a witness of truth.

[52] The authorities have long established that appellate courts will not lightly disturb findings of fact by the tribunal that is charged with that duty. The Privy Council reiterated that principle in recent times in **Bahamasair Holdings Ltd v Messier Dowty Inc** [2018] UKPC 25, and, at paragraph 36, Lord Kerr stated:

> "The basic principles on which the Board will act in this area can be summarised thus:
>
> 1. '… [A]ny appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very

careful consideration must be given to the weight to be attached to the judge's findings and position, and in particular the extent to which, he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere…' - *Central Bank of Ecuador v Conticorp* SA [2015] UKPC 11; [2016] 1 BCLC 26, para 5.

2. Duplication of the efforts of the trial judge in the appellate court is likely to contribute only negligibly to the accuracy of fact determination - *Anderson v City of Bessemer* [(1985) 470 US 564], cited by Lord Reed in para 3 of *McGraddie* [[2013] UKSC 58; [2013] 1 WLR 2477].

3. The principles of restraint 'do not mean that the appellate court is never justified, indeed required, to intervene.' The principles rest on the assumption that 'the judge has taken proper advantage of having heard and seen the witnesses, and has in that connection tested their evidence by reference to a correct understanding of the issues against the background of the material available and the inherent probabilities.' Where one or more of these features is not present, then the argument in favour of restraint is reduced - para 8 of *Central Bank of Ecuador*."

[53] Applying those principles to this case, there is nothing that warrants interference by this court with the learned Resident Magistrate's comprehensive review of the evidence and finding of fact.

[54] This ground fails.

**Verdict unreasonable (original ground 2)**

[55] The analysis of the evidence conducted by the learned Resident Magistrate, as set out above, is conclusive that this ground must fail. Mr Pantry submitted that there

was no evidence that the cheques, especially the count 22 cheques, were stolen. This submission cannot be accepted. The prosecution proved that the cheques were negotiated through Mr McDonald's intervention. The prosecution also proved the dishonest method by which the cheques, forming counts 2-10 were generated. It was reasonable for the learned Resident Magistrate to infer that the count 22 cheques were generated in a similarly fraudulent manner and she did so.

[56] This ground must also fail.

**The duplicity of count 22 issue (supplemental ground 3)**

[57] As was mentioned above, count 22 involved 102 transactions, in that, on the prosecution's case, each of the 102 cheques listed in that count involved a separate act of larceny. After the statement of offence was set out in the indictment, the particulars of the offence were set out as follows:

> "Alistair McDonald in the parish of Saint Andrew between the dates of January 23, 2004 and July 13, 2009, being a clerk or servant of Key Insurance Company Limited, stole from the said Key Insurance Company Limited valuable securities in its possession, to wit, RBTT Bank Jamaica Limited."

What followed thereafter is a table with headings as follows: "Cheque Number", "Cheque date", "Amount" and "Payee". The particulars of each of the 102 cheques, one cheque to a line, were set out in the table according to those headings.

[58] Ms Martin argued that count 22 was bad for duplicity, and in breach of the rules in the Indictment Act. Learned counsel argued that each cheque ought to have been the subject of a separate charge. This was not, Ms Martin submitted, a continuing

offence as the Crown seems to be suggesting. She relied, in support of her submissions, on **DPP v Merriman** [1973] AC 584 and **R v Robertson v Robertson** (1936) 25 Cr App Rep 208.

[59] Mrs Hay argued that count 22 does not breach the rules in the Indictment Act. She submitted that the count concerned one continuous act of stealing that was committed on different dates. She argued that considering the number of cheques involved, the formulation of the count in this manner constituted "common-sense justice and practicality". She relied on **R v Bleasdale** (1848) 2 Car and K 765; 175 ER 321 **Chiltern District Council v Hodgetts and Another** [1983] 2 AC 120 and **DPP v McCabe** (1992) 157 JP 443; [1992] Crim LR 885.

[60] It cannot be denied that count 22 is an unusual formulation. In determining whether it breaches the rule against duplicitous counts it is best to bear in mind the basic principle that "where two offences are charged in the same count the indictment is bad for duplicity" (see **R v Molloy** [1921] 2 KB 364 at page 367). It is, therefore, odd indeed that various alleged removals of cheques from Key Insurance's premises, over the course of five years, could be considered a single offence.

[61] Nonetheless, the cases cited by Mrs Hay merit examination. In **R v Bleasdale**, the accused was charged with stealing coal from under the lands of various people over the course of over four years. The prosecution, however, charged all those acts in a single count of the indictment. His counsel complained that the count was defective, on the basis that it alleged several felonies, and "may have been effected by means of

different workmen, and under the superintendence of different agents" (page [766]). Earle J held that the indictment was properly laid. He held that because the allegation was that the coal was all taken from a single shaft, there had been one continuous taking. He, in part, instructed the jury thus, at pages [767]-[768]:

> "The remarkable part of this case is, the extent of the property taken; and it has been urged that the taking each day was a separate felony, and that only one felony could be inquired into by you on this indictment. But I should say, that, as long as coal was gotten from one shaft, it was one continuous taking, though the working was carried on by means of different levels and cuttings, and into the lands of different people…."

[62] In **Chiltern District Council v Hodgetts**, the district council charged that Mr Hodgetts and his co-accused, for several months, "permitted certain land and buildings... to be used for the purposes of an office and for the storage of builders' materials in contravention of an enforcement notice" that had been served on the accused. The House of Lords held that the information charging the offence was not bad for duplicity. Lord Roskill, with whom the rest of their Lordships agreed, gave guidance, at page 128, that:

> "It is not an essential characteristic of a criminal offence that any prohibited act or omission, in order to constitute a single offence, should take place once and for all on a single day. It may take place, whether continuously or intermittently, over a period of time."

Lord Roskill applied the principle to the statute which created the offences in that case. He held that it was an offence that could "take place over a period of time". It may be

said, however, that **Chiltern District Council v Hodgetts** is not on all fours with this case as the statute in that case contemplated continuing non-compliance.

[63] **DPP v McCabe** is, however, much closer in terms of material facts. Mr McCabe was charged with stealing 76 library books belonging to a particular library service. The books that were found at his home, could have come from 32 different locations operated by the library service, and could have been taken on any number of dates over a two-year period. The defence successfully complained, at first instance, that the indictment was bad for duplicity. On appeal, by way of case stated, Watkins LJ, with whom Tucker J agreed, first noted the question that had been asked of the court:

> "Having heard the prosecution evidence on a charge of theft of 76 library books alleged to have been stolen some time between January l, 1988 and August 4, 1990, such evidence being inconclusive as to prove when and where the individual appropriations took place, was the magistrate correct to dismiss the charge on the basis that the said charge was bad for duplicity?"

[64] The learned Lord Justice accepted the principle that "[d]uplicity in a count is a matter of form; it is not a matter relating to the evidence called in support of the count". That statement was quoted from the judgment of Lawton LJ in **R v James Greenfield and Others** (1973) 57 Cr App R 849 at page 855. Watkins LJ also accepted a statement by the learned editors of Archbold (1992), volume 1, page 83, where they stated:

> "Whatever the reasons behind the earlier decisions in both lines of cases it is submitted that nowadays the courts do and should apply the test laid down in the last two mentioned cases, namely that **where an aggregate**

> **amount has been appropriated but evidence is lacking to prove when, and by what amount at a time, the individual appropriations took place, the prosecution is entitled to charge the appropriation of the aggregate amount upon a day within the period during which the appropriations took place. The same principle applies to the appropriation of a number of articles**." (Emphasis supplied)

[65] His Lordship then referred to other cases which dealt with similar circumstances where there had been several takings, or "receivings", over a period of time. He concluded from those cases that the count with which Mr McCabe had been charged was not bad for duplicity. Watkins LJ said, in part:

> "…It is a count which, as has been acknowledged in the cases to which reference has been made by me, is appropriate in the kind of circumstances which were before the magistrate, namely, that over a protracted period of time, there had been a very large number of separate takings of books from a library or libraries in the city of Cardiff or roundabout, all those libraries being in the ownership of the county council.
>
> That being so, I would quash the decision of the magistrate, based as it was upon his finding that the count was bad for duplicity."

[66] His Lordship's reasoning is convincing. Mrs Hay's submissions must, therefore, be accepted. Although there are a number of cheques involved in the count, each one has individual characteristics that would allow Mr McDonald to address it. Indeed, he did so in the case of the cheques made payable to the mechanics. The count was not unfair to him.

[67] A similar reasoning was applied in **Barton v DPP** [2001] All ER (D) 141, in which the court found that the count charging theft, was not bad for duplicity. In that case, Ms Barton stole small amounts of money averaging £15.00 each time over the course of 94 transactions. The stipendiary magistrate held that the single count charging Ms Barton with the entire sum of £1338.23 was not bad for duplicity, "although it was known when each of the 94 transactions had taken place and thus individual charges could have been brought". The magistrate held that it was "reasonable to regard the transactions as evidence of a continuing course of the same sort of dishonesty". The ruling was upheld on appeal.

[68] Ms Martin's submission that **Barton v DPP** was distinguishable cannot be accepted. The learned Resident Magistrate was, therefore, not wrong to have rejected the complaint that ground 22 is bad for duplicity. Ground 3 also fails.

**The hearsay documents issue (supplemental ground 4)**

[69] Ms Martin argued that the files produced by Mrs Bowie, the prosecution's main witness as to Key Insurance's claims process, were all hearsay. Learned counsel submitted that the very production of the files was flawed in that Mrs Bowie produced the file from a list, but she did not create that list. In addition, learned counsel argued, the files each contained a number of documents that were prepared by different persons, and there was no effort to comply with the requirements of sections 31C or 31F of the Evidence Act, dealing with allowing documents into evidence. The files being hearsay, Ms Martin submitted, they were improperly admitted into evidence.

[70] In addition to those errors, Ms Martin submitted, Mrs Bowie was allowed to give her opinion in respect of the contents of medical reports, including signatures thereon.

[71] Mrs Hay commenced her response to those submissions by pointing out that, other than for an initial objection, during the trial, in respect of one of the files, identified by Mrs Bowie, there was no objection to the admission into evidence of any of the files by that witness. Learned Queen's Counsel submitted that the initial objection was to exhibit 2 and that was on the basis that the file had not been properly identified. When that aspect was resolved, Mrs Hay submitted, the admission into evidence proceeded without further issue. She pointed out that there was extensive cross-examination on the contents of the files.

[72] Learned Queen's Counsel submitted that there was also no issue raised as to the list that Mrs Bowie used to locate the files that she produced.

[73] She argued that the files were admissible by virtue of their connection with Mrs Bowie on the one hand and Mr McDonald on the other; either one or both of them handled each of those files. The proof of the individual contents of each file, she submitted, depended on the provisions of section 31F of the Evidence Act. In addition to the statutory provision, learned Queen's Counsel submitted, the prosecution called a number of witnesses, who spoke to individual documents on certain of the files. The files, she submitted, were not used for the truth of their contents but for the fact that claims were made and a particular process was used to treat with those claims.

[74] As part of her overall submission, on this ground, that no inadmissible hearsay had been either led in evidence or relied upon for the decision, learned Queen's Counsel argued that Mrs Bowie did not render any opinion in respect of the medical reports. Mrs Hay argued that Mrs Bowie, merely noted similarities between various questioned documents. This, Mrs Hay submitted, was evidence of Mrs Bowie's "observations on the face of the papers" (paragraph 58 of the written submissions).

[75] Learned Queen's Counsel's submissions are accepted as being correct. The classic statement of law, made in **Subramaniam v Public Prosecutor** [1956] 1 WLR 965, concerning the admissibility of evidence, assists in resolving this issue. Their Lordships, at page 970 of the report, stated:

> "…Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made."

[76] In this case, the files were not accepted into evidence for the truth of their contents, but as to the fact that claims were made which proved to be false and that Mr McDonald had handled each of those files, including approving many of the false claims. The files were therefore admissible as evidence.

[77] Mrs Bowie and a claim handler, Ms Michelle Hamilton, gave evidence as to particular documents in the respective files. The purpose of their evidence was to show the process involved in those files. A reliance on section 31F of the Evidence Act was therefore not strictly necessary, as the purpose was not to prove the truth of the contents. Section 31F allows for the admission into evidence of various documents, including documents created in the course of business. The admission is allowed even where the identity of the maker of the document is not known.

[78] Section 31F of the Evidence Act states, in part, as follows:

> "31F.–(1) Subject to section 31G, a statement in a document shall be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible if in relation to–
>
> (a) criminal proceedings, the conditions specified in–
> (i) subsection (2); and
> (ii) subsection (3),
> are satisfied;
>
> (b) civil proceedings, the conditions specified in-
> (i) subsection (2); and
> (ii) subsection (4),
> are satisfied.
>
> (2) The conditions referred to in subsection (1) (a) and (b) (i) are that-
>
> (a) the document was created or received by a person in the course of a trade, business, profession or other occupation or as the holder of an office, whether paid or unpaid;
>
> (b) the information contained in the document was supplied (whether directly or indirectly) by a person, whether or not the maker of the statement, who had or may reasonably be

supposed to have had, personal knowledge of the matters dealt with in the statement;

(c) each person through whom the information was supplied received it in the course of a trade, business profession or other occupation or as the holder of an office, whether paid or unpaid.

(3) The condition referred to in subsection (1) (a) (ii) is that it be proved to the satisfaction of the court that the person who supplied the information contained in the statement in the document-

(a) is dead;

(b) is unfit, by reason of his bodily or mental condition, to attend as a witness;

(c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;

(d) cannot be found or identified after all reasonable steps have been taken to find or to identify him;

(e) is kept away from the proceedings by threats of bodily harm and no reasonable step can be taken to protect the person; or

(f) **cannot reasonably be expected, having regard to the time which has elapsed since he supplied the information and to all the circumstances, to have any recollection of the matters dealt with in the statement**.

(3A) In estimating the weight, if any, to be attached to a statement admissible in criminal proceedings as evidence by virtue of this section, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the question whether or not the person who supplied the information recorded in the statement did so contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not that person, or any person concerned with making or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts. ” (Emphasis supplied)

[79] In **National Water Commission v VRL Operators Ltd** [2016] JMCA Civ 19, Morrison P explained the importance of section 31F, for these purposes. He said, at paragraph [81]:

> "As we have seen, Batts J considered that the evidence adduced by VRL was sufficient to prove the requirement of section 31F(6)(d), that is, that the maker of the hearsay statements contained in the Category A documents 'cannot be found or identified after all reasonable steps have been taken to find or identify him'. I respectfully agree with the learned judge's conclusion. I have already suggested that the progenitor of section 31F was the English Criminal Evidence Act 1965, a measure enacted in direct response to the decision in [**Myers v Director of Public Prosecutions** [1965] 1 AC 1001]. In that case, the problem which led to the evidence of the numbers stamped on the engine blocks of the allegedly stolen cars being excluded as inadmissible hearsay was that the workmen who entered the numbers were unidentifiable. I am not aware of any authority – and Mr Williams directed us to none – which makes the admissibility of statements contained in business documents under the statutory exception created by either the Criminal Evidence Act 1965 or section 31F contingent upon the identification of the actual makers of the hearsay statements contained in the documents. Any such requirement would, in my view, restore the very mischief which the legislation sought to cure."

[80] The complaint about Mrs Bowie's evidence, as to her observations about the documents, is equally unfounded. The witness did not purport to be giving expert or opinion evidence. She testified that the format of certain documents, mainly medical reports, seemed identical. She also noted the presence of the word "eximination" on several of the medical reports. These are observations that she was permitted to make, and the learned Resident Magistrate brought her own observations to bear in respect of

those issues. The learned Resident Magistrate, by a critical comparison of documents, demonstrated how she was assisted in being convinced of the deception used in the fraudulent scheme. After comparing two signatures, said to have been made by a witness, Joyce Morgan, the learned Resident Magistrate said, in part, at page 528:

> "The evidence clearly shows that the two claims processed were not in relation to two different Joyce Morgan [sic] who coincidentally had the same name. It is also obvious that the records from Exhibit 18 [a claim file containing a genuine claim by the witness Joyce Morgan] **were deliberately altered to make a claim as per Exhibit 12** [a claim file containing a claim said to have been made by a Joyce Morgan]; the evidence of Joyce Morgan, Dr. William Brown, Mrs Karen Ritch and Mr. Kristoff Moore supports my conclusion…." (Emphasis supplied)

[81] Ms Martin's submissions on this ground cannot be supported.

**The issue of the use of the documents on the file (supplemental ground 5)**

[82] Ms Martin submitted that the files, having been improperly admitted into evidence, were allowed to be perused by witnesses, and used to give evidence about their own conduct or role in the handling of claims in respect of those files. Learned counsel submitted that that process of eliciting evidence from those witnesses was flawed. She accepted that a witness is allowed to refresh his or her memory from documents, but that there is an established process for allowing that exercise. That process, Ms Martin argued, was not followed and therefore the evidence elicited thereby, was tainted. Those witnesses, she argued, were not called upon to give evidence "independently" before seeking to rely on the documents in the files. The taint to their credibility, therefore, arose.

[83] Learned counsel also complained that the prosecution's case was flawed in this regard as there were persons who could have been identified, who were not called to give evidence as to the genuineness, or not, of various claims.

[84] These complaints are misplaced. There is ample evidence that there were hundreds of files encompassed in the period of complaint which spanned some five years. Not only would those facts speak for themselves in terms of the accuracy of any recollection of witnesses giving evidence at the trial, but there is oral testimony as to the effect that time and space had had on the memory of witnesses. Key Insurance's employees, who testified, spoke, without reference to documents, as to the processing of claims, but required reference to documents in order to give details as to particular claims.

[85] The major witness as to process, was Mrs Bowie. She explained the process from her point of view as claims manager and a person who approved claims and authorised payments. Ms Hamilton spoke to the process from the claims handler's point of view, while the "back-room" process was explained by the information technology manager, Mr Daniels and Mr Kenneth Brown, the company secretary and accountant.

[86] Mrs Bowie, at a number of places in the record, spoke to the limitations of her recollection, of individual claims. In relation to the claim files that she was asked to retrieve, she said, in part, at pages 98-99 of the record of appeal, "I am not going to guess could be one hundred don't think two hundred. I am not exactly sure how many

of the files were found, could be in the teens". In respect of those files, she also said, in part, at page 38 of the record of proceedings:

> "The list I saw Covered [sic] a period of time; I can't speak specifically to that period of time. The period of time I was concerned with was 2004-2009. I cannot tell the names out of my head. I would have to look at the list."

At page 39 she said:

> "As I sit here now I am not able to recall names of any or some of the files located. I can say cheques were generated in respect of settlement of those files. If l were to see a file from my company I would be able to identify it by means of claim number, date of accident, name of insured, correspondence on Key's letter head and claim form would say Key Insurance Company…."

[87] She subsequently identified files as falling into the category of having been dealt with by her during the course of executing her duties at Key Insurance. Each file was, thereafter, admitted into evidence as she identified it.

[88] Mrs Bowie was cross-examined as to the details of various files. She similarly indicated a need to consult the files in order to answer questions. The following exchange is recorded at page 102 of the record of proceedings:

> "Question: Would it be correct to say the files would have to be re-examined in order to close them?
>
> Answer: Yes
>
> Question: Files tendered in Court was any of them closed?
>
> Answer: Yes
>
> Question: Who closed them?

Answer: I would have to look at file itself and system in order to say who closed each file specifically"

[89] Mrs Bowie was not the only person who failed to remember details of matters outside of process. Ms Hamilton, when asked who the claim handlers were, during the period 2004-2009, said that she could not recall (see page 157 of the record of appeal). Mr Brown misquoted the number for Key Insurance's bank account and had to have his memory refreshed from his written statement to the police (see page 208 of the record of proceedings). It is only reasonable and practical, therefore, that, in examination-in-chief, and cross-examination, witnesses were directed to the documents in the respective exhibit-files, for answers as to details.

[90] The complaint at this stage about failing to have witnesses first give details from their respective memories, is not only impractical but unreasonable. Surely the best evidence would be from the documents that were created at the time when those claims were being processed. This ground cannot succeed.

**Mr Hylton's evidence (supplemental ground 6)**

[91] The aspect of Mr Hylton's evidence, which is the subject of this ground, is his testimony concerning the initiation of investigation that eventually led to the charges against Mr McDonald. His evidence was that the claims ratio at Key Insurance was exceptionally high. That led him, he said, to get the board of directors and management team to approve and implement various operational changes, but to no avail. It was when he requested, and received, information from the consultant, Mr Asphall, that he was able to focus on the haemorrhage through the route of the claim cheques.

[92] A lot of time was spent in cross-examination on the validity of Mr Hylton's theory about the claim ratios being high. The defence requested that Mr Hylton produce information from the databank of the Insurance Association of Jamaica to test the validity/genuineness of his testimony concerning the ratios.

[93] The learned Resident Magistrate dealt with the issue briefly during her summation. She noted the complaint about Mr Hylton's testimony in this regard, and demonstrated her understanding of the context that Mr Hylton was said to be "motivated by some oblique motives in initiating an investigation in the perceived failing viability of the company" (page 523 of the record of proceedings). Having analysed Mr Hylton's evidence, she found that "[t]here is no basis to support the contention that Mr Hylton's evidence is tainted by any impropriety or that the witness is not capable of belief. I have weighed his evidence, I have had regard to his demeanour and how he clearly and readily answered all questions and I accept him as a witness of truth" (page 524 of the record of proceedings).

[94] Ms Martin's submissions in respect of this ground are that Mr Hylton was improperly allowed to give evidence concerning ratios. Learned counsel submitted that that was entirely wrong as, not only was Mr Hylton relying on the input of others in arriving at his theory but that he was being treated as an expert and allowed to testify as to his opinion. Learned counsel also complained that the court was not supplied with the "full body of material that formed the basis of" Mr Hylton's opinions. Accordingly, she submitted, Mr Hylton's "opinion ought not to have been used as the substitute to

producing the persons with direct knowledge and who were named in the various exhibits and without his producing the material he relied on in forming his opinions".

[95] These complaints are misplaced. The issue of the ratios is insignificant in the scheme of this case. It was merely the catalyst that initiated the investigation that led Mr Hylton to find the multitude of cheques that flowed through CHC and U2's accounts, by way of Mr McDonald. The learned Resident Magistrate's brief reference to the matter, in her summation is testimony to the insignificance of the ratios. The issues in respect of Mr Hylton's testimony were his credibility and motive. The learned Resident Magistrate assessed him and found in his favour, in respect of both.

[96] Accordingly, Ms Martin's reliance on **R v Fitzroy Fisher** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 2/2000, judgment delivered 20 July 2000, dealing with the method of rendering expert testimony and the support that it should have, is irrelevant to this case. The decision in **R v Fitzroy Fisher** establishes that an expert should provide the necessary data to allow for testing the accuracy of his opinions. There was no need for the prosecution to have provided the learned Resident Magistrate with any data for testing the accuracy of Mr Hylton's theory as to the ratios.

[97] This ground, therefore, is also without merit.

**Mr Asphall's evidence (supplemental ground 7)**

[98] This ground makes similar complaints to some of those made in ground 6, concerning the basis for Mr Asphall's opinion evidence and the admissibility of the list of

cheques that Mr Asphall generated from his analysis of the data provided by Key Insurance. Although the learned Resident Magistrate accepted Mr Asphall as an expert witness, the ground complains that he relied on incomplete information in providing the lists that were admitted into evidence.

[99] Although there were no written submissions on behalf of Mr McDonald on this ground, Mrs Hay sought to respond to the substance of the ground by submitting that the documents provided by Mr Asphall, were properly admitted into evidence.

[100] In analysing this ground, it may be said that Mr Asphall was properly accepted as an expert witness for the purposes for which he was called by the prosecution. It was his company that had supplied the software system that Key Insurance used, after 2005, to process claims for indemnity. He testified that he had been consulted throughout the Caribbean by companies to which, his company had supplied that software.

[101] Mr Asphall described the process by which he obtained the raw data from Key Insurance's system and how, from those data, he created a spread sheet containing relevant information that would assist Key Insurance's investigation of claims that it had paid.

[102] The spreadsheet that Mr Asphall prepared was used to assist Key Insurance with its investigation. He identified the major headings of his spreadsheet, namely:

- who prepared the payment;
- who authorised the payment;

- payee;
- cheque number;
- cheque date;
- type of claim – bodily injury; and
- the claim number (page 294 of the record of proceedings).

[103] Mr Asphall testified that the spreadsheet dealt with bodily injury payments except for the payment made to Winston Gardner. It will be remembered that Winston Gardner proved to be, as reported by Mr McDonald, one of the mechanics to whom Key Insurance made a payment for work done on Mr McDonald's car. All the other payments, Mr Asphall said, were claims for compensation for bodily injury that had been approved by Mr McDonald.

[104] The spreadsheet produced by Mr Asphall was, therefore, shown to have been properly produced from Key Insurance's data and proved to be credible. The complaints about Mr Asphall's evidence cannot be supported.

**The sentencing issue (supplemental ground 8)**

[105] Ms Martin pointed out that it has taken almost six years from the date of conviction to the date of the commencement of the hearing of the appeal. None of that time, she argued, can be laid at Mr McDonald's feet. She submitted that the delay amounts to a breach of his constitutional right to a trial within a reasonable time. The established remedy, she argued, is a commuting of the sentence. Learned counsel

relied on the decision of the Privy Council in **Melanie Tapper v The Director of Public Prosecutions** [2012] UKPC 26; [2012] 1 WLR 2712] for support for her submissions on this ground.

[106] Mr Small, in a closely reasoned response to Ms Martin's submissions, sought to demonstrate that the delay in the preparation of the record of proceedings was not deliberate and not as long as Ms Martin contended. Learned counsel pointed out that the learned Resident Magistrate had been promoted to the High Court Bench and that fact helped to cause some of the delay. The delay, he said, was only four and a half years as the record of proceedings was ready from March 2019. It was counsel for Mr McDonald, learned counsel, Mr Small, pointed out, who had asked for a postponement of the appeal from the originally scheduled date in 2019.

[107] Learned counsel argued that, whereas the delay should not have occurred, this court should consider that the sentence of 18 months that was imposed for each count, was extremely light, given the sums involved and the impact on the company. He contended that **Melanie Tapper v DPP** supports the maintaining of the convictions. Mr Small argued that if there were to be any reduction in sentence as compensation for the breach of the constitutional right to a timely process, it should be restricted to one of three weeks, representing the time that Mr McDonald spent in custody before being bailed, pending the hearing of the appeal.

[108] Before addressing the respective submissions of learned counsel, it would be appropriate to note that the ground of appeal and the submissions are not strictly in

accordance with an appeal against sentence. Section 14 of the Judicature (Appellate Jurisdiction) Act, which gives the jurisdiction to affirm or adjust sentences, speaks to the correctness or otherwise of the sentence passed in the court below. The relevant portion of the section is subsection (3), which states:

> "On an appeal against sentence the Court shall **if they think that a different sentence ought to have been passed**, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor **as they think ought to have been passed,** and in any other case shall dismiss the appeal."

Although section 14 falls within the Part of that Act that deals with appeals from convictions in the Supreme Court, section 14(3) is made applicable to convictions in the Resident Magistrate Court by virtue of section 23 of the Act.

[109] Although the submissions address the substance of ground 8, the complaint in ground 8 is not against the length of the sentence imposed, but rather the lengthy process that Mr McDonald has been forced to undergo in awaiting the hearing of his appeal. Ground 8 is repeated below, purely for convenience:

> "[Mr McDonald] was sentenced on the 8th day of September, 2014 to eighteen [(]18[)] months' imprisonment on each count and that all sentences were to run concurrently: verbal Notice of Appeal was given on that day. Thereafter, there was a delay of six [(]6[)] years in obtaining the full record of the Parish Court.
>
> That having regard to the inordinate delay of over six [(]6[)] years between his sentencing by the Learned Trial Judge and the receiving of the record of the Parish Court, which constituted a breach of [Mr McDonald's] right to have his matter heard within a reasonable time, the portion of his sentence that mandates imprisonment should be set aside."

[110] Both counsel are correct in referring the decision of **Melanie Tapper v DPP** for the court's consideration. The relevant facts of that case, for this aspect of the analysis, are very similar to the present case.

[111] Mrs Tapper, like Mr McDonald, had a long wait for her trial, which also involved charges of fraud. In her case, the delay in transmitting the record of proceedings to this court was over four years. This court took that delay into account, as well as a one year delay in delivering its judgment. In **Melanie Tapper v R** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 28/2007, judgment delivered 27 February 2009, it reduced Ms Tapper's 18-month sentence to 12 months. It also suspended the sentence, but it appears that the suspension was born of a factual misunderstanding; that Ms Tapper had made restitution.

[112] The case went on appeal to the Privy Council and its decision arising from that appeal is, therefore, binding on this court. Their Lordships ruling included the following principles:

a. the local court is better placed than their Lordships to decide what length of delay amounted to a breach of the constitutional right to a timely trial; and

b. unless the delay:

    i. rendered it unfair to submit the individual to a trial; or

    ii. the trial itself was unfair,

there is no justification to quash the conviction;

c. an appropriate remedy for the breach, in the case of a conviction, would be a reduction in the sentence.

[113] Those principles and others were considered by this court in **Techla Simpson v R** [2019] JMCA Crim 37. The court particularly applied the principles extracted from **Flowers v R** [2000] UKPC 41, in determining whether, and how, the constitutional breach should be remedied. In **Techla Simpson v R**, the court, in part, in this regard, stated at paragraphs [37]- [38] that:

> "[37] **Flowers v The Queen** is also a decision of the Privy Council on an appeal from this jurisdiction. In that case, their Lordships examined the factors they considered to be relevant when addressing a complaint that there has been a breach of constitutional rights. They are:
>
> a. the length of delay;
>
> b. the reason for the delay;
>
> c. the defendant's assertion of his right; and
>
> d. the prejudice to the defendant.
>
> [38] The factor of prejudice has three further considerations, namely, the need to:
>
> d1. prevent oppressive pre-trial incarceration;
>
> d2. minimise anxiety and concern of the accused; and most importantly
>
> d3. limit the possibility that the defence will be impaired.
>
> Their Lordships emphasised that the fairness of the entire system will be skewed if a defendant is unable to adequately prepare his case." (Emphasis as in original)

The main area of stress, this court pointed out, is whether the individual's defence has been prejudiced by delay (see paragraph [48]).

[114] In applying those principles to this case, it must be said that the delay in the preparation of the record of proceedings was inordinate. Section 299 of the then, Judicature (Resident Magistrates) Act, requires the production of the record of proceedings within 14 days of receipt of the notice of appeal. That period would have been an unreasonable expectation in this case, given the length of the trial, the volume of the oral testimony and the huge number of exhibits. Nonetheless, a five-year delay is clearly egregious. It does not, however, render the appellate process so prejudicial to Mr McDonald to warrant the quashing of his conviction. It is to be noted that he was granted bail, pending appeal, approximately three weeks after he was sentenced by the learned Resident Magistrate.

[115] Based on the similarities between Mrs Tapper's and the present case, a reduction of six months would also be appropriate to compensate Mr McDonald for the breach of his constitutional right.

[116] The method of effecting the redress for the breach warrants some consideration. In **Darmalingum v. The State (Mauritius)** [2000] UKPC 30 the Privy Council quashed the convictions and sentences of the appellant as redress for the constitutional breach of a fair trial within a reasonable time. Their Lordships said, in part, at paragraph 22 of their judgment:

> "…Counsel for the respondent argued however that the appropriate remedy in this case is to affirm the conviction

> and to remit the matter of sentence to the Supreme Court so that it may substitute a non-custodial sentence in view of the delay. The basis of this submission was that the guilt of the appellant is obvious and that it would therefore be wrong to allow him to escape conviction. This argument largely overlooks the importance of the constitutional guarantee as already explained. Their Lordships do not wish to be overly prescriptive on this point. **They do not suggest that there may not be circumstances in which it might arguably be appropriate to affirm the conviction but substitute a non-custodial sentence, e.g. in a case where there had been a plea of guilty or where the inexcusable delay affected convictions on some counts but not others**. But their Lordships are quite satisfied that the only disposal which will properly vindicate the constitutional rights of the appellant in the present case would be the quashing of the convictions."

In **Melanie Tapper v DPP**, it was noted that the reason for the quashing of the conviction in **Darmalingum v The State** was later held to have turned on the facts of that case. Nonetheless **Darmalingum v The State** suggests that the remedy may be granted on an appeal in an appropriate case.

[117] **Melanie Tapper v DPP** is again relevant as, Lord Carnwath, in delivering the opinion of the Board, applied a principle that he drew from **Attorney General's Reference** [2004] 2 AC 72. Lord Carnwath said, in part at paragraph 26:

> "The same issues had been considered in 2003 in the **Attorney General's Reference** case [2004] 2 AC 72, in the context of the equivalent provision of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Lord Bingham, with whom the majority agreed, summarised the relevant principles:
>
> '24. If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under article 6(1) [the equivalent to section 16(1) of the Charter of Fundamental

> Rights and Freedoms]. For such breach there must be afforded such remedy as may…be just and appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established…***If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant***. *Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction*. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time.'" (Italics as in original) (Emphasis supplied)

Again, the suggestion seems to be that the remedy may be applied at the appellate level.

[118] Although this court, in its judgment in **Melanie Tapper v R**, treated the compensation for the breach as the basis for allowing the appeal against sentence, that does not truly accord with the provisions of section 14(3) of the Judicature (Appellate Jurisdiction) Act. Reductions in sentence, by way of redress for delay, were also granted in both **Techla Simpson v R** and **Curtis Grey v R** [2019] JMCA Crim 6. Those reductions were, however, granted as part of a wider consideration of an appeal against the correctness of the sentences. They are, therefore, slightly different from the present case where there is no appeal against the length of the sentence.

[119] Despite the method of those disposals, it would seem, given the absence of any complaint in this case about the sentence imposed by the learned Resident Magistrate, that the sentence should be affirmed. The compensation by way of redress for the breach of the constitutional right should be separately recognised, pursuant to section 19 of the Constitution. The difficulty with that approach is that section 19 requires an application to the Supreme Court for redress. That would be burdensome and unnecessary in the circumstances. The reduction of the sentence as if there had been an appeal against sentence is the more efficacious method of treating with the situation.

[120] Mr McDonald, having been sentenced on 8 September 2014, was not on bail until 3 October 2014. This period of 25 days is to be taken as time already served.

**Summary and conclusion**

[121] The various grounds of appeal against conviction, advanced by counsel for Mr McDonald, cannot succeed for the various reasons set out above. The complaint about the breach of his constitutional right to the hearing of his appeal in a reasonable time is, however, well made. The remedy that has been established to be appropriate in the circumstances, is not a quashing of the conviction, but rather a reduction of the sentence.

[122] The sentence that was imposed on Mr McDonald could be said to be relatively lenient given the amount of money that he stole from Key Insurance and the severe impact it had on that company's business. Nonetheless, the similarities with the

circumstances in **Melanie Tapper v DPP** are such that it is difficult to warrant a smaller level of compensation for the breach. The adjustment of the sentence shall be treated as a result of the appeal. Mr McDonald should also be treated as having already served a portion of his sentence.

[123] Accordingly, the orders are:

1. The appeal against convictions is dismissed, and the convictions are affirmed.
2. The appeal against sentence is allowed. The sentence imposed by the learned Resident Magistrate is set aside, by way of constitutional redress for the long delay between the conviction and the hearing of the appeal, and a sentence of 12 months imprisonment at hard labour is substituted therefor.
3. The sentence shall commence today.
4. A period of 25 days (8 September – 3 October 2014) shall be treated as having been already served.