

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL NO: 21/2008

**BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
 THE HON. MR. JUSTICE COOKE, J.A.
 THE HON. MRS. JUSTICE HARRIS, J.A.**

ALTON WEDDERBURN v R

Leonard Green instructed by **Chen, Green and Company** for the
appellant

Miss Claudette Thompson, Crown Counsel for the Crown

March 18, 19, 20, and July 30, 2009

SMITH, J.A.

1. On the 11th September, 2006, Miss Llyle Armstrong, Senior Resident Magistrate for the parish of Westmoreland, made an order that the appellant Alton Wedderburn be tried on an indictment containing forty one (41) counts for obtaining money by means of false pretence contrary to section 35(1) of the Larceny Act. The virtual complainant was Red-Stripe. The appellant pleaded not guilty to each count. The trial which occupied some 20 days began on September 11, 2006, and ended October 13, 2008 when the learned Resident Magistrate found the appellant guilty on all counts save count 1. He was sentenced to 18 months imprisonment on each count with the direction that the sentences run concurrently. He now appeals against conviction and sentence.

The Prosecution Case

2. The virtual complainant is a popular supplier of Red Stripe beer and other beverages. Mr. Paul Campbell, the Settlement Manager of Red Stripe, gave the background and explained the system used by the complainant in the sale of its product. Red Stripe has nine (9) distribution centres throughout the island. There is one distribution centre at Smithfield, Savanna-la-mar, Westmoreland. The appellant was at all material times employed by Red Stripe as the distribution manager of the Smithfield depot. At each distribution centre, Red Stripe employs and contracts driver salesmen who are entrusted with its products for sale on a daily basis. These driver salesmen not only sell beer and soft drinks but they also purchase the empty bottles and cases. It is their duty to return to the distribution centre each day and account to the settlement officer for the net value of cash sales and the purchase of 'empties'. The process by which these transactions are accounted for is referred to as the 'Settlement Process'. The contract between Red Stripe and each driver salesman governs their operation on a daily basis. There are also specific Settlement Rules and Guidelines with which the driver salesmen are obliged to comply.

3. According to the Settlement Rules and Guidelines (Exhibit 1) the cash and cheques for goods sold by the driver salesmen are to be deposited on a daily basis with the Settlement Officer or placed

overnight in the company's vault by the driver salesmen. The driver salesmen should hand over the cash and cheques by 8:00 p.m. Failing this, the cash and cheques must be deposited in the vault overnight. Cheques should only be accepted by the salesmen from pre-approved customers of Red Stripe. If a cheque is accepted from a customer who was not pre-approved, the salesman would be held liable if the cheque were not honoured and would have to pay the amount for which the cheque was drawn to Red Stripe in addition to any bank charges. Other relevant Settlement Rules are that a cheque accepted in a sale transaction must be in the name of Red Stripe - the payee, and third party cheques (that is where the payee is not Red Stripe) should not be encashed by the salesmen. Further, personal cheques of the driver salesmen or other employees should not be encashed without the prior approval of an authorized person. The authorized persons were the Financial Controller, Finance Director and the Settlement Manager.

4. Mr. Paul Campbell testified that he had never approved a personal cheque drawn on the account of the appellant or in his name. He also testified that before November 2005, on more than two occasions, Red Stripe received cheques from the appellant which were returned by the bank because of insufficient funds. Consequently, the appellant's name was placed on the company's "bad cheques customers listing" and no further cheques should be accepted from him.

5. Mr. Jermaine McIntosh was a driver salesman employed by Red Stripe. He testified that during the period October 2005 and December 2005 he drove for one Mr. Renee Honeghan of Savanna-la-mar who was on leave. He stated that on November 11, 2005 at about 6:30 p.m. the appellant came to him at the Settlement Room at Smithfield and asked him to change a personal cheque. This cheque was for \$133,000.00, the payee was Red Stripe. It was dated 11th November, 2005 and signed by the appellant. Mr. McIntosh said that he unhesitatingly complied with the appellant's request because of the appellant's position as distribution manager. The cheque was identified by the witness and received in evidence as exhibit 2. It relates to count 2.

6. Mr. McIntosh also testified that on November 15, 2005, the appellant asked him if he had any cash. When Mr. McIntosh told him that he had cash for lodgment, the appellant asked him if he could get \$200,000.00. Mr. McIntosh gave the appellant \$200,000.00 in cash from the Red Stripe money he had to be lodged. The appellant wrote up two cheques each for \$100,000.00, payable to Renee Honeghan. These two cheques were personal cheques drawn on NCB and signed by the appellant. They were identified in Court by Mr. McIntosh and received as exhibits 3A and 3B. They relate to counts 6 and 10 respectively.

7. It is also the evidence of Mr. McIntosh that on December 9, 2005 the appellant asked him to encash his (the appellant's) personal cheque for

\$130,000.00. The witness testified that he gave the appellant \$130,000.00 in cash and the appellant gave him a personal NCB cheque payable to R. Honeghan in exchange. The cash, the witness said, was part of the proceeds of sale of Red Stripe products. This cheque relates to count 36. It was received in evidence as exhibit 4.

8. The witness swore that on all these occasions he encashed the appellant's cheque because he was afraid that if he had refused to do so the appellant would cause him to lose his job. Exhibits 2,3A, 3B and 4 were not honoured by the bank. They were lodged to Red Stripe Account and were stamped "Insufficient Funds /Refer to Drawer".

9. Another truck driver, Mr. Oral McIntosh, testified that in November 2005 he worked at Red Stripe's Savanna-la-mar distribution centre, in Westmoreland. He recalled that during November and December, 2005, the appellant asked him to encash several cheques from the cash he received from the sale of Red Stripe products. He said that he did as the appellant asked because the appellant was the distribution manager. He identified five (5) NCB cheques which he encashed for the appellant. The payee on three of the cheques is the witness and the payee on two is Red Stripe.

The following three (3) cheques were written by the appellant:-

- cheque dated November 14, 2005 for \$150,000.00, payee Oral McIntosh
- cheque dated November 15, 2005 for \$159,000.00, payee Oral McIntosh

- cheque dated November 15, 2005 for \$12,500.00, payee Oral McIntosh.

The other two were written by the witness at the request, he said, of the appellant:-

- cheque dated November 21, 2005 for \$180,320.00
- cheque dated November 21, 2005 for \$100,000.00

All five cheques were signed by the appellant. They were all stamped "Insufficient Funds/Refer to Drawer"- see exhibits 5A-E. These relate to counts 5,8,9,15 and 16. Mr. Oral McIntosh said it was the appellant who asked him to write up the last two cheques referred to above. After he wrote them, the appellant, he said, signed them and returned them to him. He lodged them in the vault in the Settlement Room at the distribution centre. He swore that he did not in anyway benefit from encashing the cheques for the appellant. When the cheques were returned, he could not find the appellant.

10. Mr. Andrew Nathan also gave evidence for the prosecution. He was a sales contractor of Red Stripe. He testified that during the period November 13 to December 9, 2005 he encashed twelve (12) of the appellant's personal NCB cheques at the latter's request. He swore that he gave the appellant cash for the cheques from sums received from the sale of Red Stripe products. These cheques, he said, were lodged in the Red Stripe vault. All of these cheques were returned endorsed

"Insufficient Funds/Refer to drawer". He identified these cheques which he said he saw the appellant sign. The payee on each cheque is "Andrew Nathan". They were received in evidence as exhibits 6A-L. They concern counts 11,12,13,14, 32,33,35,37,38,39,40 and 41 and are for \$150,000.00, \$100,000.00, \$100,000.00, \$100,000.00, \$150,000.00, \$110,000.00; \$99,777.00; \$170,596.98; \$177,380.00; \$130,000.00; \$127,000.00 and \$195,000.00 respectively. Mr. Nathan testified that when the cheques were returned he went in search of the appellant but to no avail. The amounts on the cheques, he stated, remained unpaid.

11. Ms. Tracia Jackson, the appellant's sister-in-law was at the material time employed to Red Stripe at Smithfield, Westmoreland as the Settlement Officer. The Distribution Centre Manager, that is the appellant, was in charge of her. As Settlement Officer, she was responsible to settle the accounts of the salesmen daily. She would check the products consigned to each salesman when he was about to proceed on his route each morning. When the salesman returned she would check to ensure that the sales balanced with the cash, customer cheques, cash invoices and ledger credit bills. She would do an overall summary of cash and cheques and put them in a lodgment bag for Brinks to take to the Bank.

She testified that if a cheque was returned it would be placed in the lodgment bag at the bank. The lodgment bags were collected at the bank by the appellant or herself. If a cheque was returned she would

copy the returned cheque, give the salesman a copy so that he would contact the particular customer and fax a copy with a report to the head office in Kingston.

12. Ms. Jackson testified that during the period September 2005 to December 2005, she noticed that the daily lodgments of the salesmen had a large number of the appellant's personal cheques. She spoke to the particular salesmen concerning these cheques and then she went to the appellant. She told him that "his cheques were getting too much and too regular." The appellant did not take kindly to her speaking to him about this and accused her of "trying to fight against him." She feared losing her job and therefore said no more at that time. In December 2005 she was spoken to by the Settlement Accountant and consequently she told the appellant that head office was requesting all the returned cheques. The following day the appellant gave her a batch of returned cheques. She examined them and observed that they were the appellant's personal NCB cheques and that his signature was on all of them. She copied the cheques and prepared a report to send to the head office in Kingston. Ms. Jackson testified that the appellant asked her not to send in the report "because he was going to get the money to replace the cheques." She told him she had to fax it to Kingston as head office was waiting on it and so she faxed her report along with copies of the returned cheques to Kingston.

13. Of the cheques Ms. Jackson received from the appellant and copies of which she sent to the head office, she identified seventeen (17) of the appellant's NCB personal cheques. These 17 cheques, she said, were written up by her on the instruction of the appellant. They were signed by the appellant in her presence and made payable to Red Stripe. Ms. Jackson swore that she wrote them up because she thought she had to obey the appellant who was her immediate boss and when she tried to stop the cheques, the appellant threatened her. The cheques were received in evidence as exhibits 11A-Q. Two are dated 14/11/05; eight are dated 21/11/05; four are dated 25/11/05; one is dated 23/11/05 and two are dated 25/11/05. They were for amounts ranging from \$150,000.00 to \$238,000.00. They are the subjects of counts 3, 4, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31. Appearing on all of these cheques are the words "Insufficient Funds/Refer to Drawers."

14. Mr. Andrew Wynter was at the material time the Loss Prevention Manager of Red Stripe. He was responsible for the physical security of Red Stripe facilities throughout the island. He was responsible for investigating non-compliance with the rules and procedures of the company and criminal acts of any of its employees, contractors and suppliers. He recalled that on December 14, 2005 the Logistics Manager of Red Stripe and its Financial Controller contacted him and handed over to him copies of a number of returned cheques. Thereafter, he went to

the Distribution Centre in Savanna-la-mar. At the centre he spoke with Tracia Jackson who gave him approximately forty-one (41) original cheques. These were NCB cheques bearing Alton Wedderburn's name and signature and had been returned by the bank because of insufficient funds. The amounts for which the cheques were drawn totalled four to five million dollars (\$4M – 5M), he said. He did not see the appellant. He tried, to no avail, to get in touch with the appellant. He testified that the appellant contacted him and informed him that he was off the island. The appellant, he said, told him that a number of things had taken place at the distribution centre. The witness said that he advised the appellant to return to the island "to clear up the matter".

15. In May or June 2006, Mr. Wynter met the appellant at Alhambra Inn in Kingston. They again met in Montego Bay and went to the Area One Fraud Squad where Mr. Wynter made a report. He said that the appellant admitted signing the cheques. He said that the appellant "attempted to explain to me why he had given the salesmen cheques and the salesmen gave him cash. He was trying to explain to me that there was a shortage and some kind of problem in the distribution centre account and he was trying to facilitate clearing up the problems that had occurred in the distribution centre" (p 211 of the record). In cross examination he said he was not of the impression that the appellant was seeking to cash cheques with named salesmen and taking the cash for

himself. He did not form the impression that the appellant was drawing the cheques for his own benefit.

16. Mr. Stuart Barnes is a Banker employed to National Commercial Bank. At the material time he was the Bank Manager at the Savanna-la-mar branch. His responsibility was to monitor loans, overdrafts, current accounts and cash management. He testified that the appellant had an account at the NCB Savanna-la-mar. The account number was 611014597. He told the court that he had occasion to speak to the appellant about the operation of the account. The appellant's account, he said, showed frequent overdrawn balances which were unauthorised. He testified that the appellant had a small overdraft limit which had "expired". He said that he spoke to the appellant about the overdrafts on a number of occasions. The appellant advised him that a deposit would be made to clear the account. A statement of the appellant's account #611014597 for the period August 23, 2004 to December 31, 2006 was received in evidence as exhibit 8.

17. During cross-examination, a batch of forty-five (45) cheques drawn on the appellant's account in favour of Andrew Nathan was put in evidence as exhibit 9. These cheques cover the period July 28, 2005 to August 31, 2005. The witness agreed that the total amount of these cheques was in excess of \$3,000,000.00 and that they were all honoured by the bank. Another batch of twenty three (23) NCB cheques,

payable to Andrew Nathan and signed by the appellant was received in evidence as exhibit 10. These cheques are for the period May 20, 2005 to June 27, 2005 and were for a total sum of just over \$1.7M. These were all honoured by the bank.

18. Detective Sergeant Ethon Miller was the investigating officer. At the relevant time he was a Detective Corporal attached to the Westmoreland C.I.B. He recalled that on October 16, 2005, Mr. Andrew Wynter, the Loss Prevention Manager at Red Stripe attended the CIB office and made a report to him. Mr. Wynter handed him copies of forty one (41) NCB cheques drawn on account number 611014597 in the name of Alton Wedderburn. The total amount for which these cheques were drawn is \$5,960,770.00. These cheques were issued between November 7, 2005 and December 9, 2005 and were all stamped "Insufficient Funds/Refer to Drawer". He commenced investigations. He made several futile attempts to contact the appellant. On April 24, 2006 he saw the appellant at the Savanna-la-mar police station. He told the appellant of his investigation. The appellant replied "Officer a try me a try fi help the Salesmen them when them come in short". The appellant was taken to the C.I.B. office and shown copies of the cheques. He identified his signature on them and accepted that he issued them. When questioned by Detective Sergeant Miller, the appellant said that between December 14, 2005 and April 25, 2006 he was in Miami and the Bahamas. He was

taken into custody and subsequently charged with forty one (41) counts of obtaining money by false pretences. When cautioned he said "me nuh want to hear anything from you until me see me lawyer, you can't talk to me".

The Defence

19. The appellant gave evidence and called one (1) witness Mr. Fernon Perry in support. The appellant testified that in 2005 he was employed by Red Stripe "in management". He managed people, stocks and sales growth. He was in charge of the Savanna-la-mar depot. He testified that he received awards for his performance in sales and management of staff in addition to yearly bonuses based on growth of sales. He stated that he was able to achieve growth of sales at the depot by ensuring "that the salesmen settled on time in full and were able to leave the compound on or before 9:00 a.m. with the consigned products." When the salesmen were short, he would issue cheques to them in their names in the amounts that were required to balance their accounts so that they would satisfy the requirement of the settlement rule established by the company. He would also, he said, provide them with the required category of products based on the customer's need whether they were presold customers or route-customers. He denied receiving cash in exchange for his cheques.

20. He described the system which he established to finance the salesmen's activities in this way: The salesmen would at times ask him to

make payments for products that they were unable to pay for at the time as required by the guidelines issued by Red Stripe in the Settlement Rules. He said it was necessary for him to assist the salesmen to meet the settlement required because the system was established to ensure that the salesmen would settle in full and on time to meet the daily requirements of leaving the depot on or before 9:00 a.m. to facilitate the proper servicing of customers. This, he said, was the reason for the growth of sales.

21. The salesmen who received cheques from him based on their requests were required to pay back the amounts for which the cheques were written by lodgments to his, the appellant's, NCB account No. 611014595 within a day or two, although sometimes a week would pass before they were able to make the repayment. In this regard he exhibited two (2) deposit slips dated September 19, 2005 indicating that sums of \$250,000.00 and \$157,000.00 were deposited to this account by Mr. Andrew Nathan, a salesman – see Exhibits 12A-B. He emphasized that the system had an overdraft facility.

22. He testified that the system of financing the salesmen's activities lasted for about three (3) years. The failure of the salesmen to repay outstanding money into the system which he had established forced him to stop financing them. It is his evidence that the bank did not terminate the overdraft facility. He denied issuing cheques payable to Red Stripe.

The cheques he issued were made payable to the particular salesman who requested his assistance. When shown NCB cheque #395047 dated November 7, 2005 for \$157,700.27 he said this cheque was signed by him and drawn on his account. No payee is on this cheque. It was returned by the bank stamped "Body of cheque incomplete". This cheque is the subject of count 1 and was received in evidence as exhibit 13. According to the witness this cheque was pre signed by him. He testified that "the understanding between Tracia Jackson and himself as to how those cheques were to be used was that the cheques were to be used to settle the sales representatives' account in the event that there is a shortage on their account to be settled. These cheques are always drawn to the payee being the salesman or salesmen who made the request for the assistance". When shown exhibits 2 (cheque #395101) and 11A – Q all of which have Red Stripe as payee, he said that all of those cheques were not written up by him. They were all pre-signed by him for the purpose of assisting the salesmen and then written up by another person.

When shown exhibits 5A-E he said cheques 395131 and 395132 with Red Stripe as payee were not in his handwriting although signed by him. He swore that he did not direct Ms. Tracia Jackson or anyone to make any of the cheques payable to Red Stripe.

23. According to the appellant, Red Stripe was aware of the system he had set up to assist the salesmen. All the cheques payable to the

salesmen were deposited to Red Stripe account. For the three (3) years that the system was in place, Red Stripe did not object to his using the account in the way he had described. In December 2005, problems arose, in respect of his account. The salesmen, he said, had failed to repay moneys on the cheques which were "part of the revolving system". The banks refused to honour the cheques. During that time, he said, he was in Jamaica for sometime and was in the Bahamas for part of the time. When in Bahamas he was in contact with the company through Mr. Andrew Wynter. When he returned to Jamaica, he immediately went to head office and met with his line Manager and Mr. Andrew Wynter, the Security Manager. He stated that he was arrested and charged about one (1) month after the meeting at head office. He swore that he did not write any cheque to anyone knowing that such cheque would not be honoured.

24. During cross-examination, he stated that he owned a computer store. The NCB account was not used for the computer business, he said. Each salesman had an account with Red Stripe at the distribution centre to which the cheques would go. It was the responsibility of the settlement officer Ms. Tracia Jackson to accept or reject these payments by cheque. If the cheques were accepted by Ms. Jackson they would be sent to the bank. The money in his NCB account came from his payroll, loans from NCB and the overdraft facility. Further, he said, when the cheques are

drawn at the salesmen's requests, they are repayable by the salesmen lodging cash and or cheques to the account. He said the agreement he had with the salesmen was that it was their responsibility to ensure that the amount written on the cheque was repaid to the account on that particular day. NCB would facilitate them by extending the normal banking hours in order to have the moneys deposited to the account.

The limit of the overdraft facility was \$400,000.00, he said. A letter from the Assistant Bank Manager, Mr. Brian Baggoo reminding the appellant of his authorized overdraft limit and warning him that cheques would be returned should the account encroach the authorised limit, was received as exhibit 14. He admitted that he was aware that the salesmen might not have been able to put back the money into the system. He also admitted that he was aware that if the salesmen failed to put back the money into the system, the cheques would be returned. He was aware that the Red Stripe's account would be affected.

25. Under further cross-examination he told the court that the system he had established required that when a cheque was written to a salesman he (the salesman) should deposit the cheque to his account at BNS and in turn write a cheque to Red Stripe for the amount in question. However, he said, there was a breakdown in the system in that Ms. Tracia Jackson accepted the cheques written by him to the salesmen instead of having the salesmen depositing them to their accounts which Red Stripe had

authorised and then depositing their own cheques to Red Stripe's account. Cheques written in the names of the salesmen, he said, would be third party cheques and Red Stripe did not authorize the acceptance of third party cheques. He knew of this breakdown and so did others in management, he asserted. He agreed that sometime before November 2005, he was placed on a "bad cheque" list at Red Stripe Head Office. That, he said, meant that Ms. Jackson should not accept his cheques. He admitted that inspite of that black listing he continued to write cheques to salesmen for Red Stripe's account. He denied that he gave Ms. Jackson or anyone else instructions to write up cheques. He denied threatening Ms. Jackson.

26. Mr. Fernon Perry, a driver salesman contracted to Red Stripe testified that he had been working with Red Stripe for over eight (8) years. From time to time, he stated, he would seek the appellant's assistance in the settlement of his account with Red Stripe. There were times, he said, when customers owed him for products sold to them and in order for him to go out on time he would seek the appellant's assistance. He was shown a cheque dated 2nd December, 2005 for \$87,800.00 payable to F. Perry and signed by the appellant. He received this cheque as such assistance from the appellant. It was a loan, he stated, from the appellant to assist him to settle his account balance. He swore that he did not

exchange this cheque for cash. The cheque was admitted as exhibit 15. This cheque was returned because of insufficient funds.

27. Mr. Perry testified that on some occasions he repaid the appellant by means of cheques. He identified five cheques which he said were his personal cheques which he used to repay the appellant. These cheques were received in evidence as exhibits 16 A-E. They all have the same date, namely 29th July, 2005. He identified a batch of 56 NCB cheques bearing various dates from July 29, 2005 to August 30, 2005. All were signed by the appellant and were made payable to Fernon Perry. These cheques, he said, represented loans he received from the appellant with a view to assisting him to settle his account. The total amount on these cheques exceeded five million dollars. He said that these cheques were honoured by the bank. They were put in as exhibit 18.

28. The learned Resident Magistrate after summarizing the evidence of all the witnesses and making certain findings of fact concluded that there was overwhelming evidence that (p. 355):

"(1) At the request of Mr. Alton Wedderburn Red Stripe salesmen paid moneys to him from days sales of Red Stripe products in return for his personal cheques.

(2) The defendant Mr. Alton Wedderburn signed these cheques and gave to these salesmen in return for moneys obtained from the

sale of Red Stripe products knowing fully well there was no money in his account to cover same.

(3) Exhibit, 6 A-L personal cheques written to Andrew Nathan signed by Alton Wedderburn were for obtaining Red Stripe money by means of false pretence.

(4) Mr. Alton Wedderburn Distribution Manager of Red Stripe requested Tracia Jackson to write seventeen of his personal cheques to the order of Red Stripe. He signed these cheques knowing full well he had no money in the account to cover same. These cheques were dishonoured.

(5) Having regard to the position of authority and trust which Mr. Alton Wedderburn held at Red Stripe at the time, the nature of the transactions and the volume of personal cheques written by Mr. Wedderburn in return for moneys from days sale of Red Stripe products, the instructions Mr. Wedderburn received from the bank by way of Exhibit 14 regarding the termination of his overdraft and all the other circumstances of the case, there was the intention of the defendant to deceive, to obtain money by means of false pretence."

29. Accordingly the learned magistrate found the appellant guilty on counts 2-41 and not guilty on count 1. The appellant was sentenced to 18 months imprisonment on each count to run concurrently.

30. **The Appeal**

At the hearing of the appeal Mr. Leonard Green, counsel for the appellant abandoned the original grounds filed and sought and obtained leave to argue some 18 additional grounds of appeal.

31. I do not propose to reproduce these grounds but will of course refer to some of them while examining the submissions of counsel. As I see it, these grounds raised two main issues namely:

(i) whether at the close of the prosecution's case there was sufficient evidence to warrant the learned magistrate calling on the appellant to answer the charges – the no case to answer issue.

(ii) If the answer to (i) is in the affirmative – whether, having regard to the evidence adduced by the defence, the verdicts are unreasonable or cannot be supported.

Many of the questions of law raised in the additional grounds, in my view, pertain to either or both of the above issues.

32. **The No Case to Answer Issue**

Mr. Green for the appellant submitted that the prosecution had failed to prove:

- (i) that a false pretence was made by the appellant in respect of each of the counts on the indictment;
- (ii) that the appellant obtained Red Stripe money by virtue of the false pretence; and

(iii) that the appellant had an intent to defraud.

It is the submission of Mr. Green that the failure to establish any of these elements is fatal to the prosecution. Counsel for the appellant referred to many cases in support of his submission including **Hamilton v R** 9 Q.B. 271; **R v Ball** [1951] 2 KB 109; **R v Dent** (1955) 2 Q.B 590; **R v Gilmartin** (1982) 1 QB 953; **R v Ingram** [1956] 3 WLR 309; **R v Sagar** [1914] 3 KB 1112.

33. Miss Claudette Thompson, counsel for the prosecution, submitted that the evidence is that at the time when the cheques were presented to the salesmen for encashment, the appellant knew that there were insufficient funds to cover the amounts for which the cheques were drawn. He also knew that he had exceeded his overdraft or that the overdraft facility no longer existed. The appellant, she submitted, was blacklisted before November, 2005 and was not a preferred customer and was advised by the bank that he must operate within the limits of the overdraft. Counsel for the Crown referred to the bank statements to indicate that the appellant continued to draw cheques when he knew he had far exceeded the overdraft limit. Miss Thompson referred to the evidence of the salesmen and the system which obtained at the distribution centre and submitted that there is sufficient evidence to establish that the appellant did obtain Red Stripe money by means of the false pretence. But counsel for the Crown conceded that there was no prima facie case in respect of counts 4, 5, 25, 27, 30 31 & 34. These counts,

she said, cannot be sustained. She further submitted that the issuing of cheques at the time when the overdraft limit to the knowledge of the appellant had been exceeded is evidence from which an intent to defraud may be inferred. In this regard learned Crown Counsel cited **R v Kritz** [1949] 2 All ER 405.

34. As stated at the outset, each of the forty (41) counts charged the appellant with obtaining money by means of false pretence. Apart from the dates and the sums of money involved, the particulars of offence are the same in respect of each count. The particulars of offence for count 1 read – “Alton Wedderburn on the 7th day of November, 2005, in the parish of Westmoreland with intent to defraud Red Stripe obtained the sum of \$157,700.00 on behalf of himself by falsely pretending that he had money in his chequeing account at National Commercial Bank, Savanna-la-mar Branch to cover the amount mentioned.”

35. **The False Pretence**

The false pretence alleged in each count is that the appellant pretended “that he had money in his chequeing account.” What is the evidence adduced by the prosecution to substantiate this averment? A pretence or representation need not be by words. The law is that the conduct of a party will be sufficient. The Crown is relying on the conduct of the appellant. The evidence of the driver salesmen Jermaine McIntosh, Oral McIntosh and Andrew Nathan is that at the request of the appellant,

they encashed his personal cheques from the proceeds of the sale of Red Stripe products. There is no evidence of an oral representation by the appellant to the effect that he had money in his account. The question is whether the mere giving of the cheques in the particular circumstances of the case amounts to a representation by the appellant that he had money in his account at the Bank.

36. This matter has been the subject of discussion in the authorities. What has been judicially described as an accurate statement of the law is at para. 21-187 of **Archbold Criminal Pleading, Evidence and Practice** 2001 at p.1887:

"The representations which may as a matter of law be inferred from the mere fact of drawing a cheque are:

- (a) that the drawer has an account with the bank upon which the cheque is drawn, and;
- (b) that the existing state of facts is such that in ordinary course the cheque will be met, i.e. on first presentation."

37. The leading authority on this subject seems to be the decision of the House of Lords in **Metropolitan Police Commissioner v Charles** [1977] A.C. 177. That case concerned the obtaining of a pecuniary advantage by deception in that a credit card together with cheques were used to obtain the benefit of facilities from the defendant's bank far beyond those authorized by his bank manager. Although the offences involved were under the 1968 Theft Act and although the speeches of their

Lordships were more concerned with the nature of the representation to be implied by the use of a credit card, their Lordships also addressed the representation to be implied in the giving of a cheque. Both Viscount Dilhorne and Lord Edmund-Davies cited the following passage from **Kenny's Outlines of Criminal Law**, 19th Ed. (1966) p.359, which was quoted with approval by Phillimore L.J. in **R v Page** (1971) 2 QB 330,331:

"Similarly, the familiar act of drawing a cheque (a document which on the face of it is only a command of a future act) has been held to imply at least three statements about the present:

- (1) that the drawer has an account with that bank;
- (2) that he has authority to draw on it for that amount;
- (3) that the cheque, as drawn is a valid order for the payment of that amount (i.e. that the present state of affairs is such that, in the ordinary course of events, the cheque will on its future presentment be duly honoured). It may be well to point out however, that it does not imply any representation that the drawer now has money in this bank to the amount drawn for, inasmuch as he may well have authority to overdraw, or may intend to pay in (before the cheque can be presented) sufficient money to meet it."

38. Lord Diplock said at p. 182:

"...(It) is no doubt true to say that all the payee is concerned with is that the cheque should be honoured by the bank, and that to induce the payee to take the cheque all that the drawer is

concerned to do is to assure him that as far as can be reasonably foreseen this is what will happen."

Lord Diplock, Viscount Dilhorne and Lord Edmund-Davies held that the first and third of Kenny's representations could properly be said to be implied in the act of drawing a cheque. The second could not. Lord Simon and Lord Fraser agreed with their reasoning and conclusions.

39. Viscount Dilhorne with reference to the passage from Kenny's *Outlines* said at pp. 185-186:

"Kenny recognizes that the giving of a cheque does not imply that there is money in the bank to meet it. If a man draws a cheque knowing that there are no funds to meet it or that it is drawn for an amount which will lead to his overdraft limit being exceeded but honestly intending to pay in the money required to meet the cheque before it is presented, he would not in the old days have been convicted of false pretences for there would not have been an intent to defraud, and now, if he had the honest belief he is unlikely to have been found to have been acting dishonestly... The reality is in my view that a man who gives a cheque represents that it will be met on presentment and if a cheque is accepted by the payee, it is in the belief that it will be met."

40. In reference to the representation made by the act of drawing and handing over a cheque, Lord Edmund-Davies said at pp 190-191:

"...The legal position created by such an act was even more laconically described by Pollock B in **R v Hazelton** (1837) L.R. 2 CCR 134,140 in this way:

'I think the real representation made is that the cheque will be paid. It may be said

that that is a representation as to a future event. But that is not really so. It means that the existing state of facts is such that in ordinary course the cheque will be met'."

It is important to note that before the coming into effect of the Theft Act of 1968 in England, under the old law relating to obtaining by false pretences, which is still the law in this jurisdiction, the relevant misrepresentation had to be a representation as to existing facts. In the **Charles** case both Lord Diplock and Lord Edmund-Davis made it clear that under the 1968 Theft Act, the representation relevant to the offence of obtaining pecuniary advantage by deception must be a representation as to existing facts.

41. In **R v Gilmartin** (supra) Robert Goff L.J. who delivered the judgment of the English Court of Appeal, in reference to the **Charles** case, said at p. 960 G:

"It appears from the speeches of their Lordships, however, that the often quoted passage from Kenny can no longer be regarded as providing an accurate guide to the relevant representation in that the second element, viz. that the drawer has authority to draw on his account at the relevant bank for the amount specified on the cheque, must be rejected for reasons stated by Lord Diplock. Moreover, the first of Kenny's three (3) elements is, as Lord Edmund-Davies pointed out in agreement with Lord Fraser of Tullybelton, logically covered by the third. The third element specified by Kenny was expressed by him in two different ways, that is to say (1) a statement that the cheque as drawn is a valid order for the payment of the amount of the cheque and (2) as an explanation of the first, a statement that

the present state of affairs is such that in the ordinary course of events the cheque will on its future presentment be duly honoured. These two are, if the first is read literally, not identical, since the first statement can be read as referring to the future. It is, however, for the reasons we have already given only relevant to have regard to a representation as to existing facts and therefore the first of these two statements must be read as limited by the second. The second is, moreover, plainly derived from the words of Pollock B. in **Reg. v Hazelton** (1874) L.R. 2 C.C.R. 134, 140 quoted with approval by Lord Edmund Davies in **Reg. v. Charles**, viz. that the representation implied in the giving of a cheque is that "the existing state of facts is such that in ordinary course the cheque will be met". This terse but neat epitome of the representation is in our judgment entirely consistent with the view expressed in rather different words by Lord Diplock in **Reg. v. Charles** and should properly be regarded as an authoritative statement of the law".

42. The above passages clearly show that the representation implied by the giving of a cheque is not that the drawer of the cheque has at the time money in his account at the bank to the amount for which the cheque is drawn. Accordingly, the drawing and handing over of the cheques to the salesmen do not constitute the "false pretence" averred in each count of the indictment. Thus the prosecution failed to prove that the appellant at the time he allegedly received money from the salesmen in exchange for his personal cheques represented that he had money in his account at the bank. Failure of the prosecution to prove the making of the pretence as stated in the indictment is fatal, unless of

course the indictment was timeously amended – see **R v Barker** 5 Cr. App.

R.283. It seems to me that in the circumstances the particulars of offence should read:

“Alton Wedderburn on the ... day of ... in the parish of Westmoreland with intent to defraud obtained from ... the sum of ... by falsely pretending that the existing state of affairs was such that in ordinary course of events cheque number ... which the said Alton Wedderburn drew and delivered to the said would be met”.

This hopefully will provide some guidance. My conclusion of this aspect of the appeal is sufficient to dispose of the appeal, nonetheless I will proceed to say a word on other aspects of the appeal.

43. **The Inducement**

The prosecution must prove that the alleged false pretence operated on the mind of the person alleged to have been defrauded and induced him wholly or in part, to part, with his money or property. What is the evidence? Mr. Jermaine McIntosh testified that he gave the appellant cash for four (4) cheques – these relate to counts 2, 6, 10 and 36. As to why he encashed the appellant's cheques, he said (p. 179):

“Why I gave Mr. Alton Wedderburn cash for those cheques is a form of coward, afraid because him was the Manager and me feel say him can put in something mek mi lose me job or something. It was my first time giving him a cheque. First he approached me re the \$133,000. Me never did know him have anything bad about him. Normally if you don't settle you cant

leave the yard. When I did it the first time the cheque did not bounce or anything. It settle ."

It seems to me that on his evidence the alleged pretence did not operate on Mr. Jermaine McIntosh's mind wholly to induce him to encash the appellant's cheques. If that is so, then the important question is whether there is evidence that the alleged pretence operated on his mind in part? It seems to me that Mr. Jermaine McIntosh's evidence is not sufficient to establish prima facie that the alleged pretence in anyway induced him to part with the money. See for example **R v Dale** 7 C and P 352 and **R v Jones** 15 Cox 475. It is not necessary for me to consider whether his evidence would displace the implied representation. In any event, in the absence of argument, I would be reluctant to make a judgment on this.

44. Ms. Tracia Jackson's evidence is silent as to any inducement. Indeed, as we shall see later, there is not an iota of evidence from her that the appellant received any money from anyone in return for the cheques which she said that she wrote up on the appellant's instructions. Her evidence concerns seventeen (17) cheques payable to Red Stripe and relates to the seventeen (17) counts already referred to in para 13 supra.

45. Mr. Oral McIntosh testified that he gave the appellant "cash in exchange for the cheques he gave me because he was Manager of the

distribution at the time." It seems to me that it could reasonably be argued that his evidence does not displace the implied representation.

46. Mr. Nathan said nothing in evidence that, in my view, could arguably displace the representation implicit in the drawing and handing over of cheques which he said he received from the appellant.

Obtaining Money

47. The prosecution must also prove that the appellant obtained the money from the person to whom the false pretence was made. Messrs. Jermaine McIntosh, Oral McIntosh and Andrew Nathan all testified that they handed money to the appellant in exchange for his personal cheques. Normally, that is sufficient *prima facie* evidence that the appellant obtained money. Ms. Tracia Jackson, as I have indicated before, gave no such evidence. At p 194 she asserted that she was not the one "changing the cheques". She did not say that she saw anyone hand over to the appellant money in exchange for the cheques which she said she wrote on the instructions of the appellant. Although she said the salesmen would be there, none of the driver salesmen testified that he gave money to the appellant in respect of the cheques which were tendered in evidence through Ms. Jackson. There is no admission by the appellant in this regard. Indeed, Crown Counsel conceded that counts 4, 5, 25, 27 30, 31 and 34 cannot be sustained. Apart from counts 5 and 34, the other counts in respect of which the concession was made, are

based on the evidence of Ms. Jackson. However that is not all; Ms. Jackson's evidence relates to 17 counts – those omitted from Miss Thompson's concession are counts 3, 17, 18, 19, 20, 21, 22, 23, 24, 28 and 29. I am not sure on what basis count 5 was conceded. As far as count 34 is concerned, it would appear that the prosecution led no evidence in support thereof. The evidence concerning this count came from the defence witness Mr. Perry, who testified that he did not exchange the relevant cheque for cash – see p. 298 of Record. According to Mr. Perry this cheque (Ex 15) was issued to assist him to settle his account.

In sum, the learned Magistrate was clearly wrong in not upholding the no case submissions in respect of counts 3, 4, 17-31 and 34 on the ground that there was no evidence that the appellant obtained money in regards to any of these counts.

48. Mr. Green also submitted that in respect of counts 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 32, 33, 35, 36, 38, 39, 40 and 41 the Crown's case was that the appellant obtained Red Stripe's money from the salesmen. His submissions before the Magistrate, which he repeated in this Court, are that there is no evidence that the salesmen paid Red Stripe's money to the appellant. There can be no question, he argued, of the appellant obtaining Red Stripe's money by issuing cheques payable, for example, to Mr. Andrew Nathan. That is why, he submitted, there is no evidence that Red Stripe sought to recover monies from the appellant. Further, he

argued, there is no evidence that the false pretence was made to Red Stripe to induce it to part with its money.

49. Miss Thompson for the Crown submitted that having regard to the principle of agency, when the appellant handed the cheques to the salesmen and received cash from them in return, he was in effect handing cheques to and receiving cash from Red Stripe. She relied on **Treitel's Law of Contract** Chapter 15 pages 482-3.

50. The decision in **R v Ball** [1951] 2 KB 109; 35 Cr. App. R. 24 is instructive. In that case a vicar left a pre-signed cheque with his wife for the payment of peat. Later the same day Ball called at the vicarage and told the vicar's wife that he had delivered 3000 blocks of peat. The wife accordingly filled in the appropriate amount and handed him the cheque. In fact, Ball had delivered only 980 blocks of peat. Ball was indicted on a count charging that he with intent to defraud obtained from (the vicar's wife) a certain valuable security namely a cheque ... by falsely pretending that he had delivered ... 3000 blocks of peat. He was convicted. On appeal it was argued that Ball did not "obtain" the cheque from the vicar's wife but from the vicar because 'obtains' in the Larceny Act means "get the ownership of". An agent, it was argued, may be able to confer ownership on a third party, but the third party then 'obtains' it from the principal, not from the agent. The offence of obtaining by false pretence involves the taking of the ownership of a thing

as opposed to its possession. Lord Goddard C.J. in delivering the judgment of the Court said (p.1 (11):

Section 32, sub-s. 1, of the Larceny Act, 1916, does not say "obtains from the owner": it says "obtains from any other person ". There is no doubt that "obtains" means obtains the property and not merely possession, and the obtaining must not for this purpose be under such circumstances as to amount to larceny. The offence is by false pretences to obtain any valuable security from any other person. In this case the appellant obtained the cheque from the person named in the indictment, that is, the vicar's wife; she was the vicar's agent and had authority from the vicar to pass the property in the cheque, and she did pass the property in it. Therefore the appellant obtained the cheque and obtained the property in it from her - the person to whom he had made a false representation, and he did it with intent to deceive. Therefore all the necessary elements of the offence of obtaining by false pretences appeared to be present."

51. In the instant case the salesmen had the authority of Red Stripe to receive the proceeds of the sale of the latter's product. The money they received from the sale of Red Stripe's products is the property of Red Stripe. It seems to me that thereafter they are mere conduits for conveying the money to their principal. I agree with Miss Thompson that any false pretence made to them is made to Red Stripe, cheques handed to them are handed to Red Stripe and money received from them in the circumstances is received from Red Stripe.

The Verdict is Unreasonable or Cannot be Supported by the Evidence

52. Although not strictly necessary I am constrained to say something on this issue. The burden of Mr. Green's submission on this issue, as I understand it, is that the learned Magistrate failed to give any or any adequate consideration to the evidence of the defence in support of the appellant's claim that there was a revolving loan scheme. The gravamen of the contention of counsel for the appellant is that the verdict is so against the weight of the evidence as to be unreasonable and insupportable. Mr. Green submitted, with force, that the Resident Magistrate erred when in referring to the cheques in Exhibit 18 she held that because they "relate to period prior to November 2005", she would "ascribe no weight to them" and found that "they are of no value to the instant case." Exhibit 18 consists of 56 NCB cheques – the personal cheques of the appellant- bearing dates from July 29, 2005 to August 30, 2005. Mr. Perry's evidence was that these cheques represented loans from the appellant to assist him in settling his accounts. The total sum for which these cheques were drawn is \$5,142,739.65. The cheques were drawn on the appellant's account No. 611014597 at NCB. They were lodged to Red Stripe's account and were all honoured. I entirely agree with Mr. Green that the learned magistrate erred in holding that because they relate to a period of time prior to November, 2005 they were not relevant. In my judgment, they were relevant in that they support the

appellant's defence that he had a bona-fide revolving loan scheme to assist the salesmen and of which management knew. Mr. Green relied on ***The King v Sagar*** [1914] 3 KB 1112. In that case the prisoner was charged with obtaining goods by false pretences. The false pretence alleged was that he had pretended that he was carrying on a genuine and bona fide business as a manufacturer's agent and merchant. It was held that receipts sworn to by the prisoner as having been given to him as acknowledgments of payments for goods purchased by him other than those the subject of the charge...were admissible as evidence on his behalf that he was in fact carrying on a genuine and bona-fide business.

53. Mr. Green further submitted that the learned magistrate's failure to adequately analyse the evidence caused her to fall into error in her findings of fact. In this regard counsel referred to the following aspects of the evidence which he said supported the defence.

(i) Exhibit 13, cheque no. 395047, the subject of count 1.

This cheque is signed by the appellant. There is no payee. It went to the bank and was returned endorsed - "Body of cheque incomplete." This exhibit he said supports the appellant's claim that the cheques were pre-signed and given to the settlement officer to be used when necessary.

(ii) The following cheques which are among those received as Exhibits 6A-L do not support Mr. Andrew Nathan's

evidence that the appellant asked him to encash his, the appellant's personal cheques – cheque #395165 drawn in the amount of \$127,275.77; cheque # 395162 for \$177,350.25; cheque # 395167 for \$170,596.98. It is strange, counsel for the appellant submitted, that the appellant or anyone for that matter, would seek to encash a personal cheque for an amount including cents. The presence of these cheques, he stated, is consistent with the appellant's defence that the cheques were drawn to enable the salesmen to balance their accounts. This point applied to personal cheque # 395106 for \$125,300.75 a part of exhibit 11 which Ms. Jackson said she wrote upon the instruction of the appellant.

(iii) Exhibit 9 (a batch of forty five (45) NCB personal cheques signed by the appellant and drawn in favour of Andrew Nathan) shows that Andrew Nathan during the period July 28, 2005 to August 2005 negotiated cheques with a total value of \$3,281,046.50 drawn on the appellant NCB account #611014597. Exhibit 10 is a similar batch of cheques for the period May- June 2005 with a total value of \$1,708,052.92. The learned magistrate when reviewing the evidence of Mr. Stuart Barnes (at p. 351 of the Record) said "I do not attach any weight to exhibits 9 and 10 a total of sixty

eight cheques tendered by the defence and admitted in evidence through the witness. These cheques all signed by Alton Wedderburn and made out to Andrew Nathan relate to the period May to August, 2005. They do not relate to the relevant period of November to December 2005..."

In respect of these cheques, Mr. Green contended that had the learned resident magistrate properly considered them she would not have concluded that the appellant did not have a system for advancing cheques to the salesmen to settle their accounts so that they could leave the depot by (9:00 a.m. with a consignment of goods.

54. Other instances of the learned magistrate's erroneous rejection of relevant evidence were referred to by Mr. Green. In my view those referred to above support the appellant's contention that the verdict is so against the weight of the evidence as to be unreasonable and insupportable.

55. **Conclusion**

(1) In our view, the prosecution failed to prove the false pretence as stated in the particulars of each count.

(2) The prosecution failed to adduce any evidence that the appellant obtained any money in respect of counts 3, 4, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 34.

(3) The learned Resident Magistrate erred in holding that no weight should be attached to exhibits tendered by the defence on the ground that they did not relate to the period November to December 2005. The relevance of these exhibits was to show that the appellant had a system of advancing loans to the salesmen by issuing cheques drawn on his account at NCB. Consequently, there would be no intent to defraud.

(4) Accordingly, we would allow the appeal, quash the convictions, set aside the sentences imposed and enter verdicts of acquittal in respect of each count.

SMITH, J.A.

ORDER

The appeal is allowed. The convictions quashed. The sentences imposed set aside and judgment and verdicts of acquittal in respect of each count entered.