[2014] JMCA Crim 26

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 1/2013

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

OSWALD JAMES v R

Brian Barnes instructed by Wilson Franklyn Barnes for the appellant

Mrs Lisa Palmer Hamilton and Leighton Morris for the Crown

18, 19, 24, 30 July 2013 and 9 May 2014

PANTON P

[1] The question for determination in this appeal is whether Her Hon Mrs Lorna Shelly-Williams, Resident Magistrate for the Corporate Area, was correct in finding that the appellant, who is an attorney-at-law, had converted to his or someone else's use or benefit the sum of US$237,500.00 entrusted to him for a particular purpose. The learned Resident Magistrate had no doubt that he did, and on 20 April 2012 sentenced him to two years imprisonment.

[2] The particulars of offence were that the appellant "[b]etween 1 February 2008 and March 1st, 2008 being entrusted by Mr Carl Lewis and or Prosporex Investment

Club Inc. with US$237,500.00 that he might pay the said money for the purchase of a property in respect of the said Carl Lewis, Fraudulently Converted the said money to his use and benefit or the use and benefit of some other person".

[3] The case for the prosecution was to the effect that the appellant received a total of US$337,500.00 for the purpose of purchasing a particular piece of real estate. That purchase did not take place as the vendor did not respond positively to the offer to purchase. The money had been given to the appellant in two amounts, a manager's cheque for US$37,500.00 and a wired transfer of US$300,000.00 from Canada. These amounts were provided at the instance of Carlton Lewis, a director of related entities known as Prosporex Investment Club Inc, Prosporex Company Inc. and Prosporex Limited Inc. On the failure of this initiative, there were discussions as regards other likely properties for purchase, particularly with regard to a property called Queen Hill. Given the failure of tentative discussions as regards the acquisition of Queen Hill, the return of the money given to the appellant was sought. To date, only US$100,000.00 has been refunded and there has been no proper accounting for the balance.

[4] The defence was that the evidence of the main witnesses for the prosecution is flawed, and should not be believed. No money has been refunded as the appellant, acting on oral instructions, allotted US$100,000.00 for investment in a musical production known as "Sting", and the balance of US$237,500.00 in Queen Hill. Hence, there has been no conversion of the money, or any portion of it.

The evidence for the prosecution

[5] The main witness for the prosecution was Carlton Lewis, sometimes called Carl Lewis, a financial advisor, who resides in Toronto, Canada. He described himself as chief executive officer of "all the divisions of Prosporex Inc". These "divisions" included the entities named Prosporex Investment Club Inc, Prosporex Investment Limited and Prosporex Limited, Inc. There were three partners who were directors of these companies: Sedwick Hill, Morris Scott and Carl Lewis. Mr Lewis claimed to have been the individual who made all the final decisions. Prosporex Investment Inc was located in Kingston, Jamaica, while that which Mr Lewis described as the parent company was based in Canada.

[6] Mr Lewis and the appellant are alumni of the University of Toronto. They were in touch for a while in Canada, and then the appellant returned to live in this country. They reconnected in late 2007 when Mr Lewis came to Jamaica and incorporated Prosporex Limited in Kingston. Mr Lewis retained the services of the appellant with regard to the purchase of a property known as Villa Maria at 33 Seymour Avenue, Kingston. The sale price was US$2,500,000.00 with the deposit specified as US$375,000.00. The vendor's attorney-at-law was Miss Andrea Rattray. Mr Lewis and the appellant had a meeting with representatives of the vendor. Thereafter, Mr Lewis contacted his partners in Canada and gave instructions with a view to the sum of US$300,000.00 being sent by wire transfer to the appellant's account at First Global Bank. This was done. In addition, Mr Lewis gave the appellant a manager's cheque for US$37,500.00 making a total of US$337,500.00 to be put towards the deposit for the

purchase of Villa Maria. Mr Lewis, in conversation with the appellant, formed the impression that the vendor wished to increase the price for the property. To that end, Mr Lewis instructed the appellant to make an offer of US$2,600,000.00 to the vendor. The appellant complied. In a further meeting with a representative of the vendor, concern was expressed by the representative as to the purpose to which the purchaser would be putting the property. In the final analysis, the offer by Mr Lewis to purchase the property was not accepted by the vendor. In communicating the news to Mr Lewis, the appellant said "one door close, many more open".

[7] According to Mr Lewis, upon the failure of his bid to purchase Villa Maria, he requested the appellant to return the money that had been entrusted to him for the transaction. The appellant told him that it was secure, so seeing that he trusted the appellant he was not in a hurry to receive the money at the time. The appellant, he said, then tried to encourage him to invest the money in "a project on Queen Hill that he [the appellant] and Mr Shawn Patrick Decarish were in the process of developing". Mr Lewis said he did not invest in the project, and told the appellant that he "absolutely had no interest" in it. Mr Lewis said that he started to demand the money from the appellant when he noticed that the appellant was engaged in some expensive undertakings. According to Mr Lewis, the appellant started to avoid him so he instructed his assistant Miss Jasmine Puranda to do the collection of the funds. Mr Lewis said that prior to giving instructions to Miss Puranda he had tried several times, by word of mouth as well as in writing, to have the appellant return the money but all his efforts were in vain.

[8] The money to be collected by Miss Puranda was US$337,500.00. She collected US$100,000.00 which she gave to Mr Lewis. That money came from the appellant's account. There was a promise by the appellant to pay the balance in a week's time, but that promise was not kept. More calls were made by Mr Lewis to the appellant but they bore no fruit. The appellant continued to advance the idea of investing in the Queen Hill property, and to that end arranged a meeting with Mr Christopher McCalla, one of the owners of the Queen Hill property. However, there was a "falling out" between the appellant and Mr Decarish so the project was put on hold.

[9] Mr Lewis said that a meeting was arranged with Minister Olivia Grange whom the appellant had asked to mediate as regards the return of Mr Lewis' money. The need for the mediation was due to the fact that Mr Lewis had threatened to call the police. At that meeting, the appellant showed Mr Lewis a cheque for US$304,000.00 which he said required the co-operation of Mr Decarish's common law wife for it to be signed over to Mr Lewis. However, nothing fruitful resulted from this.

[10] According to Mr Lewis, the last promise that the appellant made to him prior to his calling the police was one whereby he would pay US$10,000.00 per month in order to clear the indebtedness. Mr Lewis asked the appellant to make a deposit of US$50,000.00 and put the promise in writing and then they "could talk". This, the appellant failed to do – hence, the report to the police.

[11] Mr Lewis said he did not give the appellant any permission to use his money (US$237,500.00) to invest in Queen Hill or to be used in any other manner.

[12] Mr Shawn Decarish, a convicted fraudster who was deported from the United States of America to Jamaica, said that he was a very good friend of the appellant. He said that he (Decarish) and one Mark Jones purchased the Queen Hill property from Christopher McCalla (Chris John Distributors). The appellant agreed to be nominee purchaser of the property and signed the agreement as such. Attorney-at-law Conrad Powell represented the vendors and the purchasers. The nominee purchaser would in due course, according to the arrangements made with him, transfer the property to a company formed in St Lucia for the purpose. However, the relationship between Mr Decarish and Mark Jones went sour. A sum of approximately US$400,000.00 had been paid over by the attorney-at-law Powell to Mr McCalla in connection with the sale. The appellant was retained by Mr Decarish to finalize the purchase. In this regard, Mr Decarish said that he gave the appellant US$300,000.00 to pay to Mr McCalla. The payments were made to Mr McCalla in increments by the appellant, although the money had been given to him in two amounts of US$150,000.00 each over a two-week period in cash in 2007. The final payment for the Queen Hill property was made in April 2008. No receipts were issued and no money was contributed personally by the appellant to the purchase of Queen Hill, said Mr Decarish.

[13] Mr Decarish and the appellant formed a company in which they were equal partners for the purpose of collecting bad debts. The idea of forming this company was that of Mr Decarish. In response to the idea, the appellant told Mr Decarish that he had access to funds so the formation of the company could be a reality. The agreement arrived at between them was for the appellant to provide funds for renting the space

and to provide equipment and furniture for the office. The appellant was able to find US$100,000.00 to pay for a year's rental in advance, and he partitioned the office at a cost of J$7,000,000.00, said Mr Decarish.

[14] According to Mr Decarish, he and Mr Mark Jones intended to build apartments and townhouses on the Queen Hill property. However, the relationship between them broke down. There was a discussion, he said, between himself, Mr Lewis and the appellant as regards the Queen Hill property, and they all visited the property. However, there were no negotiations with Mr Lewis with a view to getting him to invest in the property. He confirmed that the relationship between the appellant and himself also broke down. This was due, said Mr Decarish, to a transaction involving Mr Decarish's girlfriend. Mr Decarish denied any knowledge of the appellant buying Mr Mark Jones' share of the Queen Hill property following the breakdown of the relationship between Mr Decarish and Mr Jones.

[15] Mr Christopher McCalla gave evidence of knowing Mr Decarish since 2005 or 2006. He was introduced by Mr Decarish to the appellant in 2007, and, through the appellant, he met Mr Lewis in 2008. Queen Hill is owned by Chris John Distributors. The latter entered into an agreement to sell Queen Hill to Mr Decarish who said that he had a partner, Mr Mark Jones. Mr McCalla met Mr Jones in 2008. The sale price was US$1,000,000.00. However, according to Mr McCalla, in order "to beat the system", the price was fixed at J$45,000,000.00. The agreement was exhibited as exhibit 8. The appellant was nominee purchaser. When this witness was shown exhibit 8, he said that it was not the one he signed and that the signature on it was not that of his sister, who

is a partner in Chris John Distributors. Mr McCalla said that he received various sums of money from Mr Decarish through the appellant in connection with the sale. He said that there had been some discussions with Mr Lewis but those discussions fell through. He had no arrangements with Mr Lewis, and received no money from or on his behalf in connection with Queen Hill – whether for sale of the land or purchase of shares in the development.

[16] Miss Jasmine Puranda, a trained project manager and business consultant, was employed to Prosporex. She did cost benefit analyses and gave opinions on the viability of projects. She was also a human resources manager. She knew of the transfers of money in respect of the proposed purchase of Villa Maria, and the failure of that plan. She was aware of the deposit of US$330,500.00 to the account of James & Co. When asked in examination-in-chief if she knew what had happened to that sum, she responded: "your guess is as good as mine. I can tell what happened to one particular amount". She said that Mr Lewis made several attempts to recover the money after the Villa Maria deal had fallen through but he was not successful. It then became her portfolio to collect from the appellant. After some time had passed, she said that the appellant gave her a cheque for US$100,000.00 which she gave to Mr Lewis. She asked the appellant for the remaining portion and he told her that she "could come back next week to get the balance as it was in his client account". The money was still not recovered, and the appellant did not give any reason for failing to return it. Whenever she made requests for the balance, she said she was told that the appellant was not in office. This was so, even after meetings had been arranged with him.

[17] Miss Puranda testified that the appellant asked her to try to get Mr Lewis to invest in the Queen Hill property. However, when she spoke to Mr Lewis about it, he said that he had no interest in doing that. He was not interested in "investing in anything on a hill side, further the return on the investment would be too long". In view of this, she continued to demand the outstanding amount from the appellant but there was no response from him. She then reported the matter to the General Legal Council and the Fraud Squad. Under cross-examination, this witness said that she was not aware that James & Co had confirmed in a letter dated 13 May 2008 that the money due would be returned to Canada, and that the appellant had given an undertaking to return it. She said she was aware of Mr Lewis making a financial commitment to the musical event called "Sting", but she was not privy to any discussion between one Mark Scott and Mr Lewis about financially investing in the event.

The evidence for the defence

[18] The appellant gave evidence. He said that he did not use any money received from Mr Lewis for his personal benefit. He spoke of the failure of the Villa Maria transaction. According to the appellant, after the failure, he and Mr Lewis "discussed an alternative strategy" which was "the Queen Hill purchase". He said that for Mr Lewis, Queen Hill would be a new transaction whereas for him (the appellant) it was an ongoing transaction. He said that the registered subscribers of ChrisJohn Distributors, registered proprietors of Queen Hill, were Christopher McCalla and his sister. He was retained in 2007 by Mr Mark Jones and Mr Decarish to act as a purchaser for the property. The agreement for sale was drafted by Mr Conrad Powell, attorney-at-law,

and he (the appellant) merely signed it and gave it to Mr Decarish. He said he had been told that Messrs Jones and Decarish were equal partners. Eventually, Mr Decarish and Mr Powell came to the appellant and informed him that Mr Powell was no longer the attorney-at-law for the project. Mr Powell, thereupon, turned over the files to the appellant.

[19] The appellant formed the view that Mr Decarish and Mr Jones were "no longer seeing matters eye to eye", and this he said was confirmed by Mr Decarish who said that he had tendered his resignation from the company owned by Mr Jones. The appellant said that Mr Jones asked him to find someone to replace him (Mr Jones) in the Queen Hill transaction, so he began to search for an investor to take Mr Jones' position. This, he said, was about November - December 2007. Mr Decarish, he said, was getting quite anxious about the completion of the transaction involving Queen Hill, so he discussed the matter with Mr Lewis. The "strategy" was for Mr Lewis to "buy into an existing development project and to use as he termed it, his network marketing connections to raise the development moneys". He said that Mr Lewis "authorized [him] that his organization would take out Mark Jones". This meant: "Whatever money that had been paid by Mark Jones or pursuant to the transaction, the 50% of the transaction, his organization would compensate for that so at the end of the day Patrick Decarish would own 50% of the development and he and his organization would own 50% of the development" (page 198 record). The authorization, he said, was given to him by Mr Lewis in a meeting on 25 February 2008.

[20] The appellant stated that he had oral instructions from Mr Lewis as well as from Mr Mark Scott (one of Mr Lewis' partners in Canada) to invest in Queen Hill on behalf of Prosporex Ltd. Consequently, according to him, he gave Mr McCalla the monies that had been wired to his account from Canada on the instructions of Mr Lewis. The Canadian partner, Mr Mark Scott, according to the appellant, was pursuing a US$10,000,000.00 loan to execute the development project. The wired funds were a temporary advance to secure their participation in the Queen Hill development, as those funds were to be returned to Canada "from the proceeds of the major development loan that [Mr Scott] was negotiating". The loan did not materialize. In the meantime, the appellant said he was making payments to Mr McCalla for ChrisJohn Distributors, the registered owners of Queen Hill. At page 204 of the record, the appellant is recorded as testifying thus:

> "When I was instructed to take a position in Queen Hill property I had formulated the opinion that Mark Jones's [sic] position had to be bought out to keep the transaction alive and Prosporex Limited was therefore taking over Mark Jones's [sic] position in that transaction."

[21] Subsequent to this stance, the appellant said that he learnt that the monies that had been paid by Mr Conrad Powell to Mr McCalla were in fact entirely Mr Mark Jones'. Indeed, Mr Jones had lodged a caveat which was served on the appellant. Thereupon, the appellant contacted both Mr Decarish and Mr McCalla. The latter, the appellant said, asked him to keep the transaction alive and stated that he did not care who the

purchasers were. The appellant said he then suggested to Mr Lewis "that instead of taking Mr Jones's [sic] position on the transaction there is now an opportunity to acquire the entire property". He arranged, he said, to introduce Mr Lewis to Mr McCalla. After their meeting, Mr Lewis called Canada and spoke to Mr Scott. The appellant gave this account of what happened after that meeting:

> "We agreed to have another meeting with Mr. McCalla, and to make a formal offer for the entire project on behalf of Prosporex. The idea of making a fresh offer was the idea of the person on the telephone. I simply wanted the agreement in place to be assigned but for reasons explained I should prepare a fresh offer for the purchaser Prosporex Limited. After that I prepared two sets of agreements. Agreement for the sale of Land, and agreement for the Sale of Plans. I took them to Mr. Lewis in triplicates. He signed on behalf of the purchaser and affixed the seal of Prosporex Limited on the documents and he then arranged for the 3 of us, him Mr. McCalla and me to meet at the office of Minister Grange. That would be the third meeting."

[22] At the meeting in the Minister's office, there was a discussion as regards price. According to the appellant, this meeting took place in May or June 2008. When it became known to Mr Lewis that the deal would result in the appellant benefitting to the tune of US$100,000.00, Mr Lewis became quite boisterous resulting in the appellant leaving the room, taking a copy of the agreement with him. According to the appellant, Mr Lewis subsequently invited him to his office with a view to resolving the situation. The appellant said he went to Mr Lewis' office where he saw both Mr McCalla and Mr

Decarish. Seeing that he did not wish to be in the same room with Mr Decarish, he (the appellant) left.

[23] The appellant said that it was untrue to say that Mr Lewis asked for the return of the sum of US$237,500.00. On the contrary, he said that Mr Lewis consented to the total sum being paid to Mr McCalla. He denied that Miss Puranda was chasing him to collect the money. The transaction is now in abeyance and there are suits pending in the Supreme Court. As regards the US$100,000.00 that Miss Puranda said that she had received from the appellant, the latter said that the payment was specifically made as an investment in the "Sting" entertainment project; and that he had been advised by Mr Lewis and his Canadian partners to advance that sum from the monies "designated for the Queen Hill to [sic] Prosporex Limited".

[24] Under what seems to have been intense cross-examination, the appellant is recorded as having said the following:

> "... I was instructed by Mr. Lewis to invest in the Queen Hill property after the Villa Maria deal fell through. Those instructions to invest in the Queen Hill property were not given to me in writing. I carried out the instructions to invest in the Queen Hill property.
>
> The proof of the investment is the receipts from Mr. Christopher McCalla. There was no agreement drafted by me to show that I invested the money with Mr. McCalla. There were meetings between myself and Mr. McCalla and Mr. Carl Lewis. There are no minutes or documentation with regards [sic] to these meetings. On the 26th day of February, 2008 I was instructed to invest money with Mr. McCalla and bought a manager's cheque

which I gave to Mr. McCalla when I invested the money, the proof of the investment was the cheque to Mr. McCalla which he accepted and encashed. On the 26th day of February, 2008 when I gave the cheque to Mr. McCalla there was no meetings [sic] between Carl Lewis and Mr. McCalla. Mr. Lewis was never introduced to Mr. McCalla as yet by me." (page 225 of the record)

[25] The appellant continued:

> "I was instructed to take a position on behalf of Prosporex Limited. My clients Prosporex Limited were advised that it would be taking an existing position to which payments made pursuant to that position would have to be repaid in order to substitute Prosporex Limited. …
>
> In relation to Carlton Lewis and or Prosporex Limited Mr. McCalla became aware of the investment. He became aware of it when the opportunity arose for Prosporex Limited to acquire the entire project … The investment was for Prosporex Limited.
>
> I did receive the instructions but it was Prosporex Limited, not from Carl Lewis or Prosporex Investment Club Inc. … I got instructions from Mr Lewis and Mark Scott. These instructions were not in writing.
>
> I do not have an investment agreement between Carl Lewis and or Prosporex Investment Club Inc and the owners of Queen Hill. I had meetings but I have no record or minutes of those meetings." (pages 226 – 228 of the record)

[26] The appellant continued thus, under cross-examination:

> "There was an agreement for the sale of the Queen Hill property. On this agreement of sale I signed as nominee on behalf of Shawn Patrick Decarish and Mark Jones. I agree that I was the agent of Mr Shawn Decarish and

> Mr. Jones with respect to the Queen Hill property. As the nominee I am the agent that acts on behalf of the purchasers. Mr. Lewis was buying out Mr. Jones's [sic] share of the Queen Hill property. The change from Jones to Lewis is not a fundamental change in the agreement with Mr. McCalla. I did not inform Mr. McCalla of the change from Jones to Lewis when this change was made. … The sales agreement was between McCalla and Oswald James and so there was no change to the agreement. Earlier I said I was acting on behalf of the purchasers. The money that I paid over to Mr. McCalla for the Queen Hill property was not my personal money.
>
> I got instruction to divest his share. I have no instructions to sell his share to Mr. Lewis." (page 230 of the record)

[27] And further:

> "The agreement between Mr. McCalla and the beneficial purchaser that I signed on behalf of was an agreement for the sale of land. Mr. Carl Lewis was replacing Mr. Mark Jones as a purchaser. I said to the court that Mr. Lewis invested in the Queen Hill property. It is one transaction. I imagine there are differences between sale agreements and investment agreements. The moneys that I pay [sic] over to Mr. McCalla was for the further payment of the purchase price.
>
> When Mr. Jones asked me to find a replacement and Mr. Lewis was the replacement for Mr. Jones, Mr. Jones was not repaid his portion in the Queen Hill property. As the Attorney acting on behalf of Mr. Jones I did not request Mr. Jones' portion in the Queen Hill property from Mr. Lewis. The agreement did not speak to any partial payment it was one agreement. There was no arrangement or agreement between Jones and Lewis for Mr. Lewis to pay off Mr. Jones in the Queen Hill property. I have no

> instructions in writing for Mr. Lewis to buy out Mr. Jones's [sic] portion of the Queen Hill property. I had nothing in writing. As the attorney acting on behalf of Mr. Lewis and Mr. Jones I did not believe this arrangement should be put in writing." (pages 232 – 233)

[28] The appellant called witnesses, including an attorney-at-law, Mr Michael Lorne. The latter spoke of having a conversation in 2009 with Mr Lewis at a day party in Barry, Canada. He said Mr Lewis "was basically seeking [his] assistance" in something that "had to do with property investment, real estate development". Mr Lorne formed the view that the development was in Queen Hill. He said he was uncomfortable with the situation that was brought to his attention and described it as "one big mix up situation and it appeared to [him] that persons wanted to withdraw what was there". He said he referred Mr Lewis to another lawyer who was present who deals with real estate and investments. Another witness said that he had been engaged by Mr Scott to draw plans in respect of the Queen Hill property. The other witnesses dealt with the non-production of a statement which has apparently been lost on a computer used by the police.

The findings of fact

[29] The learned Resident Magistrate conducted a thorough review of the evidence and the following are some of the findings that she made:

i. the sum of US$337,500.00 was entrusted to the appellant for a particular purpose, namely, as a payment towards the purchase of the Villa Maria property;

ii. after the failure of the plan to purchase the property, the appellant retained the money;

iii. Mr Lewis contemplated the prospect of purchasing other properties but, due to various reasons, decided against doing so;

iv. Mr Lewis had discussions in relation to the Queen Hill property, and made an offer to purchase same;

v. due to encouragement by the appellant, Mr Lewis signed an agreement as director of Prosporex Limited to purchase the Queen Hill property but that agreement was never signed by the vendor;

vi. the receipts advanced by the appellant as evidence of payments made to Mr McCalla for the purchase of the Queen Hill property on behalf of Mr Lewis or Prosporex Limited do not bear any indication that those payments were made in that regard, whether as investment in or part purchase of Queen Hill;

vii. the receipt dated 24 December 2007 predates the receipt of any money by the appellant from Mr Lewis;

viii. the first sum of money received by the appellant from Mr Lewis was in early 2008 after the offer for sale had been signed in respect of Villa Maria;

ix. Mr Lewis did not instruct the appellant to invest any portion of the money in the Queen Hill property;

x. Mr Lewis requested the return of the sum of US$337,500.00;

xi. the appellant returned the amount of US$100,000.00, thereby leaving an outstanding balance of US$237,500.00;

xii. the appellant has acknowledged his failure to return the money and this is evidenced by a written undertaking given by him in a letter dated 13 May 2008 to "return the said balance on or before July 30, 2008";and

xiii. the giving of the undertaking indicates that the appellant has converted the sum of US$237,500.00 to his own use or to the use and benefit of another person.

[30] The learned Resident Magistrate found that the letter of undertaking was clear and unambiguous. She rejected the explanation offered by the appellant that he wrote the letter promising to repay a sum which is not owed, so someone else could think that the money is owed and so grant a loan. The appellant had said that he issued the undertaking in an effort for a loan to be sourced for the development of the Queen Hill property.

The grounds of appeal

[31] The appellant filed five grounds of appeal on 1 May 2012. They are as follows:

> "1. The verdict was unsafe and unreasonable having regard to the evidence and the circumstances of the case.
>
> 2. The Learned Resident Magistrate wrongly convicted on the evidence led by the Crown which was insufficient to warrant a conviction in the circumstances of the case.
>
> 3. The Learned Resident Magistrate erred in law in finding that there was fraudulent conversion when the Crown had failed to prove the essential elements of the offence according to law.

4. In finding the Appellant guilty of fraudulent conversion, the Learned Resident Magistrate failed to give any or any sufficient consideration to the following critical facts in the case:

    i. The evidence of the virtual complainant and main Crown witness was significantly discredited.

    ii. The evidence of all the Crown witnesses failed to disclose what were the specific instructions given to the Appellant respecting the use of the US$237,500.00 which is the subject of the fraudulent conversion charge.

    iii. The evidence of the Crown witnesses that the US$237,500.00 was delivered to the Appellant until after [sic] the transaction complained of was cancelled.

    iv. The evidence led at the trial which showed a specific transaction involving the virtual complainant to purchase a property in Queen Hill in which over US$237,500.00 was paid by the Appellant to the Vendor of the Queen Hill property.

5. The Learned Resident Magistrate erred in law in rejecting the submission that there was no case to answer."

[32] On 5 June 2013, the appellant filed 15 supplemental grounds of appeal. They read as follows:

"**GROUND 1**

The learned Resident Magistrate erred in ruling in favour of the Crown for non-disclosure of a statement from Carlton Lewis that was taken down on a computer by an investigating police, saying that there was nothing to disclose.

Wherefore the non-disclosure constitutes a material and crucial irregularity in the trial and the Appellant was not afforded the facility to have a fair trial and hence the conviction and sentence flowing from that process was unsafe and unsatisfactory and should be set aside and quash [sic].

GROUND 2

That in response to the applications, including four (4) written applications supported by affidavit and filed in the Resident Magistrate's Court, for full disclosure of all relevant materials the Crown failed to disclose unused material that was relevant to the issues in the trial and during the trial the prosecution adduced evidence that was inconsistent with the relevant unused material in its possession.

The prosecution additionally neglected to disclose the previous criminal conviction of Crown witness Shawn Decarish for fraud.

These actions are demonstrative of prosecutorial misconduct, thereby denying the Appellant a fair trial. Wherefore the non-disclosure constitutes a material and crucial irregularity in the trial and the Appellant was not afforded the facility to have a fair trial and hence the conviction and sentence flowing from that process was unsafe and unsatisfactory and should be set aside and quash [sic].

GROUND 3

That the learned Resident Magistrate erred in law when she refused the Defence's application, on 4 January, 2012 for disclosure of a report by Carl Lewis to the commissioner of police, documents from the commissioner's office to the fraud squad and documents respecting an investigation for Carlton Ivanhoe Lewis.

Wherefore the non-disclosure constitutes a material and crucial irregularity in the trial and the Appellant was not afforded the facility to have a fair trial and hence the conviction and sentence flowing from that process should be set aside and quash [sic].

GROUND 4

That the learned Resident Magistrate erred in law when she refused the Defence's application, on 15 February, 2012 to admit the entire statement made by Carlton Lewis at the Half Way Tree police station as first-hand hearsay and instead admitted only sections of the said statement, when the statement was clearly relevant, in it Carlton Lewis contradicted his evidence in the box and in previous statement and the requirements under the Evidence Act for the statement's admission was satisfied, hence the refusal constitutes a non-direction resulting in a misdirection.

GROUND 5

That the learned Resident Magistrate's Finding of Facts, listed at 1.c. in the Finding of Facts (page 385 of the bundle), that: 'The money was entrusted to the Accused for the deposit on a property referred to as Villa Maria', is not supported by the totality of the evidence that the deposit on the Villa Maria property was US$375,000.00 and that amount was never received by the Appellant

during the currency of the offer to purchase Villa Maria which ended on February 25, 2008.

GROUND 6

That the learned Resident Magistrate's Finding of Facts, listed at 1.e. in the Finding of Facts (page 387 of the bundle), that: 'Once the sum of $300,000 was released to the Accused man's account and the sum of $37,500 US was given to the Accused by means of a manager's cheque Carlton Lewis gave evidence that he was of the view that he has satisfied the payment needed for the deposit of the Villa Maria property' goes against the weight of all of the evidence and the failure of the learned Resident Magistrate to demonstrate her basis for accepting that evidence from Carlton Lewis constitutes a non-direction resulting in a misdirection.

GROUND 7

That the Learned Resident Magistrate erred in law and in fact in finding that it was Carlton Lewis and not Prosporex Investment Club Inc. which entrusted the funds with the Accused.

GROUND 8

That the learned Resident Magistrate's Finding of Facts, listed at 3. in the Finding of Facts (page 388 of the bundle), that: 'After the sale failed to proceed Carlton Lewis viewed three other property [sic] as he intended to purchase property. The pursuit of the three properties arose under cross-examination. The Accused was retained by Carlton Lewis in relation to the feasibility of purchasing these three properties, Carlton Lewis did not purchase any of those three properties due to various reasons', is not supported by the evidence.

GROUND 9

That the learned Resident Magistrate's Finding of Facts, listed at para.4. in the Finding of Facts (page 389 of the

bundle), that: At a later date Carlton Lewis made an offer to purchase the entire Queen Hill property and that sales agreement was never signed by the vendor for the Queen Hill property is not supported by the totality of the evidence. Sections of the statement of Carlton Lewis that was [sic] admitted into evidence (page 401 of the bundle) are: "i. After I was introduced to Mr. McCalla we discussed price, and offer was made for $1.2 million US dollars. ii. I recall recording the paperwork was prepared by Mr. James's law firm. iii. The vendor signed back the offer of $1.2 million dollars."

GROUND 10

That the Learned Resident Magistrate erred in law and misdirected herself in finding that 'there are a number of discrepancies and inconsistencies in the Crown's case which I do not find go to the heart of the Crown's case' and in failing to recognize and appreciate that her findings of inconsistencies and discrepancies must have, in the mind of a reasonable person, an impact on the credibility of the crown's witnesses and the crown's case and that the Accused is entitled in law to the benefit of any doubt that such inconsistencies and discrepancies may raise, constitutes a non-direction resulting in a misdirection.

GROUND 11

That the learned Resident Magistrate misdirected herself in assessing the relevance of evidence given at the trial and thereby failed to recognize the significance of the discrepancies in the evidence of Carl Lewis in determining whether he was a witness of truth.

GROUND 12

That the learned Resident Magistrate found as a fact, listed at (c) in the Conclusion (page 406 of the bundle), that: 'The Accused showed Carlton Lewis a cheque from Adoni Limited and indicated that the money was part of

the cheque.' Is not supported by the evidence. The evidence of Carlton Lewis is that the Appellant showed him a cheque made out to a lady (page 14 in bundle). It was the un-documentary supporting evidence of Mr. Decarish that the Appellant had a cheque made out to a company named Adoni Limited, that he and his girlfriend are the owners of Adoni Limited and that the money belonged to his girlfriend.

That the failure of the learned Resident Magistrate to demonstrate her basis for accepting that evidence from Mr. Decarish, a Crown witness with a previous conviction for fraud, constitutes a non-direction resulting in a misdirection.

GROUND 13

That, having regard to the evidence given at the trial and the findings of the learned Magistrate, the learned Resident Magistrate erred in law by failing to afford the doubt which ought to have been raised in her mind by the evidence before her.

GROUND 14

That the learned Resident Magistrate's Conclusion, listed at (f) in (page 406 of the bundle), that: 'I find from the fact alone that the Accused made agreements to repay the sum either orally or on the letter of undertaking dated the 13th day of May, 2008 that the Accused converted the sum of $237,500 US to his own use or the use or benefit of somebody else.', goes against the weight of the evidence and she failed to accurately direct herself on the central issue of dishonesty that constitutes a non-direction resulting in a misdirection.

GROUND 15

That the learned Resident Magistrate erred in law and misdirected herself in failing to recognize that based on

the evidence the Accused lacked the necessary *mens rea* to ground a verdict of guilty of fraudulent conversion."

[33] The appellant filed two further supplemental grounds of appeal on 2 July 2013. They read as follows:

> "**GROUND 1**
>
> The learned Resident Magistrate's [sic] erred in fact in finding that the following was a fact not in dispute:
>
> > 'At the time the Accused received the sum amounting to $337,500 US Carlton Lewis was making attempts to purchase the property referred to as Villa Maria'.
>
> **GROUND 2**
>
> The learned Resident Magistrate erred in law when she refused to admit into evidence a statement produced by a computer that did not constitute hearsay under section 31H of the Evidence Act.
>
> The statement was created by Mr. Robert Fuller and sent to Mr. Mark Scott. The learned Resident Magistrate ruled that there is no foundation laid to satisfy section 31G of the Evidence Act."

[34] Given the number of grounds, we found it helpful that Mr Barnes provided written submissions in which he argued the grounds under what he described as five major headings: Non-disclosure, prosecutorial misconduct, no case to answer, section 31 of the Evidence Act and unreasonable verdict. It does no injustice to Mr Barnes to say that in his oral presentation he placed great emphasis on the issues of non-disclosure, credibility of the witnesses and the sufficiency and reliability of the evidence

on which the conviction was founded. Consequently, it is appropriate to treat the grounds of appeal in the light of those issues.

Non-disclosure

[35] The prosecution's general duty of disclosure extends to anything which might arguably assist the defence. The obligation to disclose only arises in relation to evidence which is or may be material in relation to the issues which are expected to arise, or which unexpectedly do arise, in the course of the trial. The failure of the prosecution to disclose to the defence evidence which ought to have been disclosed is a material irregularity which will result in an appeal being allowed, unless the proviso applies: ***Regina v Ward*** [1993] 1 WLR 619 at 641-2. Where there are matters that are likely to be of importance to the defence and they are under the control of the prosecution, those matters ought to be disclosed: ***Harry Daley v R*** [2013] JMCA Crim 14.

[36] In opening the case for the prosecution, the clerk of the courts indicated that it was intended to call evidence to prove that money was given to the appellant for a specific purpose which did not materialize. However, the money was not returned although requests had been made for that to be done. Thereupon, Mr Barnes, for the appellant, said that he had learnt that three persons had been interviewed but he had not received statements from them. The clerk of the courts said that she was not aware of any statement being taken from those persons, and that she had disclosed to the appellant all statements that had been received. The interviews, she added, were unrelated to the instant case.

[37] In his submissions, Mr Barnes said that "the matter of non-disclosure has dogged this matter" due to the failure of the prosecution "to make full disclosure to the Defence". He said that the prosecution had withheld statements that were likely to be of importance to the defence and which were in the possession of the prosecution. He said that during the course of the trial the prosecution reported that some statements that came into its possession were lost, and it remained silent on other material which were still in their possession but remained undisclosed. Having regard to the failure to disclose despite many applications, the appellant was, according to Mr Barnes, denied a fair trial as he was not put in a position to know the case he had to meet and to prepare his defence accordingly. In the circumstances, Mr Barnes submitted, the conviction is unsafe and ought not to be allowed to stand.

[38] Mr Barnes listed the following documents that he said existed and were not disclosed:

a. the second statement of Carlton Lewis taken down on a computer at the fraud squad;

b. the original statement of Christopher McCalla taken down by hand at the fraud squad;

c. the statement of Carlton Lewis taken down in Half Way Tree by Corporal Wesley Watson, now Inspector of Police;

d. the statement of Carlton Ivanhoe Lewis to the Commissioner of Police;

e. the documents from the Commissioner of Police to the fraud squad in response to the statement from Carlton Ivanhoe Lewis;

f. the material from the fraud squad's investigation for Carlton Ivanhoe Lewis;

g. the name(s) and address of Bank of Nova Scotia staff who were interviewed by Sgt Jacqueline Dodd; and

h. the address of Gina Foote of Coldwell Banker Realty Limited who was interviewed by Sgt. Jacqueline Dodd.

[39] The submission by the prosecution in response to the challenge on non-disclosure was that there had been no unfairness to the appellant. The prosecution admitted that there were statements taken from the witness Lewis which have not been produced. The reason advanced for the non-production was the 'crash' of the computer. This explanation was offered to the learned Resident Magistrate, and she found it reasonable. She also adjourned the proceedings at intervals to facilitate requests on behalf of the appellant in this regard. There were even intervening high court proceedings to secure an order for disclosure. In respect of the initial non-disclosure of the criminal record of Mr Decarish, no comment has been made by the prosecution on appeal. It appears therefore that there has been an admission as regards this complaint by the appellant.

[40] There is no doubt that the prosecution was under a duty to disclose the record of Mr Decarish. However, as it turned out, the appellant was aware of the convictions and duly placed them before Mr Decarish who admitted them unhesitatingly. In the

circumstances, therefore, Mr Barnes may have overstated the importance or relevance of this non-disclosure. As regards the various statements, it is clear that one was unsigned and at least one other was lost due to problems with the computer on which it was recorded. There is no evidence to indicate that the loss of this statement was due to negligence or any deliberate action on behalf of the police. Hence, it is not reasonable to say that there has been any unfairness to the appellant in the situation.

[41] In the circumstances, there was nothing that was egregious in the conduct of the prosecution, so far as disclosure is concerned, that would permit a description of the trial as unfair. The defence was in no way hampered or hindered in testing the prosecution witnesses, or in advancing the case for the defence. Therefore, the grounds of appeal relating to non-disclosure are without merit.

Credibility of the witnesses

[42] The appellant has challenged the acceptance by the learned Resident Magistrate of the evidence of Mr Lewis and Mr Decarish, in particular. Counsel placed much emphasis on inconsistent statements made by Mr Lewis, and expressed concern that the learned Resident Magistrate accepted his evidence, notwithstanding the inconsistencies. He submitted that the good character of the appellant was ignored in the process.

[43] The major plank of the appellant's challenge of the evidence of Mr Lewis was in relation to Mr Lewis' denial of being interested in the purchase of, or investment in, the Queen Hill property. Mr Barnes pointed to the fact that Mr Lewis signed an agreement

on behalf of Prosporex as purchaser. This agreement was admitted in evidence as exhibit 3. Mr Barnes submitted that Mr Lewis had an interest in Queen Hill, and the appellant was led to believe so. In the circumstances, he said that an investment by the appellant in the property could neither be dishonest nor fraudulent. Mr Barnes also challenged Mr Lewis' denial as regards an investment of US$100,000.00 in the Sting entertainment project. He said that Miss Puranda's evidence contradicted Mr Lewis' in that she said that he made a commitment of US$100,000.00 to the project, and that sum was invested by Prosporex. He submitted that given the timing of the receipt of US$100,000.00 from the appellant, and Miss Puranda not knowing the source from which the money had come, it is open to inference that that money was the same as received from the appellant. In the circumstances, "it would put paid to the allegation of Mr Lewis that he was chasing Mr James for the return of the money and support Mr James' evidence that he was instructed to advance the US$100,000 for a short term investment in Sting".

[44] These denials, submitted Mr Barnes, meant that Mr Lewis ought not to have been believed by the learned Resident Magistrate. Hence, he said, the conviction is flawed.

[45] Mr Decarish gave evidence as regards the collapse of the relationship that he had with the appellant. It was due, he said, to the appellant's failure to deliver to him and his girlfriend a cheque in respect of a land transaction. The cheque was made out to Adoni Limited, according to Mr Decarish. This evidence, Mr Barnes said, differed from what Mr Lewis told the court in that regard. Mr Lewis had said that the appellant

had shown him the cheque which was made payable to the common law wife of Mr Decarish, but the appellant had said that he needed the co-operation of Mr Decarish to have her sign the cheque so that he could pay Mr Lewis. This discrepancy, Mr Barnes said, should have caused the learned Resident Magistrate to consider whether there was collusion between Mr Lewis and Mr Decarish to deceive the court.

[46] The response of the prosecution was that the learned Resident Magistrate was entitled to accept the evidence presented by the prosecution, and reject the evidence of the appellant. It was submitted that it "cannot be inferred, as suggested, [on behalf of the appellant] that evidence of any semblance of interest or dealing in Queen Hill, translates to an intention and express authorization by Mr Lewis for 'Villa Maria funds' to have been invested in Queen Hill". That inference, it was contended by the prosecution, was not inescapable and it having been "presented before the Learned Resident Magistrate … she rejected it as she was fully entitled so to do". In any event, counsel submitted that the sale agreement (exhibit 3) was unsigned by the vendor and represented happenings after the offence had been committed. It had little material bearing on the question of the approved or unapproved use of the sum of money in issue, US$237,500.00.

[47] As regards the cheque referred to by Mr Lewis and Mr Decarish, counsel for the prosecution pointed out that the learned Resident Magistrate had said that she would not take that evidence into consideration.

[48] It has often been stated that an appellate court does not lightly interfere with the findings of fact made by a court that has seen and heard the witnesses give evidence. The learned Resident Magistrate was in the best position to assess the witnesses in the case. These witnesses gave evidence at length, under what appears to have been vigorous and searching cross-examination. The learned Resident Magistrate was also assisted in her assessment of the witnesses by the several documents that were admitted in evidence. Having combed through the 569 pages that form the transcript in this case, we see no reason to interfere with the findings of the learned Resident Magistrate so far as the credibility of the witnesses is concerned. She took into consideration all that needed to be considered on that score. It is also incorrect to say that she did not give the good character of the appellant due consideration in determining this issue of credibility.

The law of fraudulent conversion

[49] The information on which the appellant was arrested in August 2009 alleged a breach of section 24 (1)(iii)(a) of the Larceny Act. The indictment on which he was tried, consequent on the order granted by the court on 14 March 2011, alleged a breach of section 24(1)(iii) of the Larceny Act. The particulars of the indictment read:

> "Oswald James between 1 February 2008 and March 1st 2008 in the Corporate Area being entrusted by Mr Carl Lewis and or Prosporex Investment Club Inc. with US$237,500.00 that he might pay the said money for the purchase of a property in respect of the said Carl Lewis, fraudulently converted the said money to his own use and benefit or the use and benefit of some other person."

In her reasons for judgment, the learned Resident Magistrate said that the appellant was charged under section 24 of the Larceny Act, but erroneously quoted from section 24 (1)(iii)(b) thus:

> "Every person who;
>
> Having either solely or jointly with any other person received any property for or on account of any other person, fraudulently converts to his own use or benefit, or the benefit of any other person, the property or any part thereof or any proceeds thereof, shall be guilty of a misdemeanor, and on conviction thereof liable to imprisonment with hard labour for any term not exceeding seven years."

[50] As a consequence of this lapse by the learned Resident Magistrate, Mr Barnes has complained that the appellant was "being tried on one law and judged on another during which time the Defence has been trying to catch up". According to him, this raises "serious issues" which have "serious implication" as to whether the appellant had a fair opportunity to defend himself. This statement must have been made "tongue in cheek", seeing that the record of appeal has not disclosed a lack of appreciation of the issues by the learned Resident Magistrate. Furthermore, the particulars stated in the information and the indictment were in similar terms as regards the entrusting of the money to the appellant for the purchase of property, and the conversion of same to his use and benefit, so there was no question of the appellant and his attorney-at-law being confused or unsure as to the details of the charge he was facing.

[51] Section 24(1)(iii)(a) and (b) of the Larceny Act reads thus:

> "Every person who –
>
> (iii) (a) being entrusted either solely or jointly with any other person with any property in order that he may retain in safe custody or apply, pay, or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof; or
>
> (b) … fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property or any part thereof or any proceeds thereof,
>
> shall be guilty of a misdemeanor, and on conviction thereof liable to imprisonment with hard labour for any term not exceeding seven years."

This was the charge on which the appellant was tried, and he was fully aware of it.

[52] On a charge of fraudulent conversion, the prosecution must prove "first, that the money was entrusted to the accused person for a particular purpose; secondly, that he used it for some other purpose; and thirdly, that such misuse of the money was fraudulent and dishonest": ***Regina v Marshall Nicholas Bryce*** [1955] 40 Cr App R 62 at 63.

[53] Section 64(2) of the Larceny Act is relevant to any trial for fraudulent conversion. It reads:

> "(2) On the trial of any indictment for the fraudulent conversion of any property, or the proceeds thereof, it shall be *prima facie* evidence of such conversion if it is established by evidence that the person to whom the property was entrusted –
>
> (a) absconded without accounting; or

(b) kept out of the way in order not to account; or

(c) having been duly called upon to account failed to give any satisfactory account of such property or the proceeds thereof."

The sufficiency and reliability of the evidence

[54] There was an effort by the appellant to deny that the money was entrusted by Mr Lewis. However, there can be no doubt that whether the money was from Mr Lewis or from one of the companies in which he had an interest, it was Mr Lewis who was in negotiations with the appellant and on whose instructions monies were sent to the appellant. In addition, it was Mr Lewis who accompanied the appellant to First Global Bank for the purpose of verifying the source of funds.

[55] The purpose of the money was quite clear. It was to purchase the property known as Villa Maria. The appellant and Mr Lewis had a face-to-face meeting with representatives of the vendor of the property. The appellant even received instructions from Mr Lewis to increase the offer being made for the purchase of the property. There is no doubt that the transaction did not materialize, and the sum of money that had been wired to the appellant's account on Mr Lewis' instructions was cleared the day after the failure of the transaction but was allowed to remain in the appellant's account. The money had been received at the bank on 19 February 2008; the offer to purchase Villa Maria was rejected on 25 February 2008, and the proceeds of the wired funds were released on 26 February 2008.

[56] Mr Lewis undoubtedly had shown an interest in acquiring property in Jamaica. He had sought and received advice from the appellant in respect of possible acquisitions. It seems that the closest he came to actually purchasing real property was in the Villa Maria situation. Amid his denial of an interest in acquiring an interest in the Queen Hill property, there were discussions between him and the vendor, also with Mr Decarish and the appellant. He even signed an agreement that had been prepared by the appellant. As stated earlier, this was admitted in evidence as exhibit 3. However, this agreement was incomplete in several respects. It was undated and the vendor had not signed. Special condition 2 of that agreement states that it is a condition precedent to the coming into effect of the agreement that it shall be signed by the parties thereto, and the deposit paid to James & Co, the vendor's attorneys-at-law. The meeting with the Minister of Government was with a view to settling any misunderstanding there may have been between the appellant and Mr Lewis. After that meeting, it was very clear that Mr Lewis had no interest in Queen Hill and wished to have the money returned. The appellant was also in no doubt as regards what he was required to do. This is so because he wrote a letter dated 13 May 2008 which was admitted in evidence as exhibit 5. By that letter, he gave his professional undertaking as well as that of James & Co. to "return the said balance [US$237,000] on or before July 30, 2008". That deadline expired approximately six years ago, and the money has not been returned. It is noted that in the said letter it is stated by the appellant that the money is owed to Prosporex Investment Club Inc. The insincerity of this letter is obvious when it is considered that

there is no evidence that the money has been returned to Prosporex Investment Club Inc either.

[57] As stated earlier, the appellant said that the wired funds were a temporary advance to secure participation in the Queen Hill development. Under cross-examination, he said that he had invested the entire sum of US$237,500.00 with Mr Christopher McCalla for ChrisJohn Distributors, owner of the Queen Hill property. The receipts from Mr McCalla were proof of the investment, he said. The appellant has not received any written instructions from Mr Lewis or anyone else in respect of this supposed investment by Mr Lewis. Indeed, up to the date when the wired funds were released by the bank, Mr Lewis had not even met Mr McCalla.

[58] The evidence presented by the prosecution shows that on 27 July 2007, ChrisJohn Distributors Limited, as vendor, entered into an agreement (exhibit 8) with the appellant ("Oswald James or Nominee") as purchaser in respect of the Queen Hill property. This agreement bears the signatures of Mr McCalla for the vendor, and the appellant for the purchaser. The consideration is stated as J$45,000,000.00. A deposit of J$22,500,000.00 was payable on signing, with the balance payable upon completion. The date for completion was within 120 days of the signing of the agreement upon payment in full of all monies payable by the purchaser, in exchange for delivery of a registrable transfer in the name of the purchaser, and the duplicate certificate of title. It will be recalled that the appellant as nominee purchaser was to transfer the property to a company in St Lucia. It will also be recalled that Mr Decarish and Mr Mark Jones were the real purchasers and that the appellant was standing in their stead.

[59] There is documentary evidence that on 31 July 2007, Mr McCalla acknowledged receipt of US$148,023.88 in cash from Mr Conrad Milton Powell, the attorney-at-law then acting for the purchaser. There was further acknowledgment by Mr McCalla on 10 September 2007 of the receipt of J$24,000,000.00 from the said attorney-at-law. At that point in time, there remained a balance of J$38,000,000.00 which was due on or before 30 days from 10 September 2007 (see page 546 of the record). Mr Powell, the attorney-at-law left the picture at this stage. There followed payments by the appellant to Mr McCalla as follows:

(i) 12 November 2007 – J$4,000,000.00;

(ii) 24 December 2007 – US$30,000.00;

(iii) 26 February 2008 – US$100,000.00;

(iv) 7 April 2008 – US$20,000.00;

(v) 10 April 2008 – US$18,600.00; and

(vi) 15 April 2008 – US$30,000.00.

[60] Mr Decarish and Mr Mark Jones were each to pay 50% of the purchase price for Queen Hill, and various sums were paid by these individuals up to the time their friendship and partnership became fractured. There are further payments necessary to complete the purchase but the source has dried up due to the break in the relationship. It is against this background that the appellant tried to get Mr Lewis involved in the process. However, the appellant never disclosed to Mr Lewis that he was the nominee purchaser; nor did he inform Mr Lewis of the St Lucia company to which the property was to be transferred.

[61] In respect of the Queen Hill property, the following evidence was before the learned Resident Magistrate:

(i) Mr Lewis said that the appellant never told him that he was doing a development with Mr Decarish;

(ii) Mr McCalla said that he received no money from Mr Lewis or on his behalf whether for sale of the land or for the purchase of shares in the development;

(iii) Mr Decarish said that he gave the appellant US$300,000.00, in two amounts of US$150,000.00 each over a two-week period in 2007, to pay to Mr McCalla. These amounts were in cash, and no receipts were issued.

(iv) Mr Decarish said that the appellant paid the money to Mr McCalla in increments;

(v) Mr Decarish said that the appellant contributed no money of his own to the purchase price; and

(vi) Mr Decarish had no knowledge of the appellant or Mr Lewis buying Mark Jones' share of the property.

[62] From the foregoing, it is clear that the learned Resident Magistrate had sufficient evidence before her of the receipt of money by the appellant from Mr Lewis for a particular purpose (the purchase of Villa Maria). There is evidence that the money was not used for the purpose. There is a conflict between the appellant and Mr Lewis as regards what has happened to the money. The appellant has contended that the money was used towards the purchase of the Queen Hill property, or to invest in it. Mr Lewis said that was false. The prosecution produced evidence that the appellant was nominee purchaser of the very property, having entered into a written agreement to that effect seven months before the receipt of the money from Mr Lewis. There is documentary

evidence to show that substantial payments were made towards the purchase prior to the receipt by the appellant of the money from Mr Lewis. The learned Resident Magistrate had evidence of requests by Mr Lewis for the return of the money and of a meeting with a Minister of Government for her to mediate in the situation. There was evidence of a cheque for US$304,000.00 being shown by the appellant to Mr Lewis in the presence of the Minister, with the appellant stating that Mr Lewis' money was included in the cheque but it could not be paid as the co-operation of Mr Decarish was not forthcoming. Significantly, there is the letter of 13 May 2008 (exhibit 5) acknowledging the debt and giving a professional undertaking to return the balance by 30 July 2008.

[63] In the circumstances, the learned Resident Magistrate had ample material from which she made the findings listed at paragraph [29]. She took into consideration the inconsistencies and discrepancies that emerged on the prosecution's case, the stained character of Mr Decarish, the documentary evidence particularly the agreements and receipts, and the evidence of the appellant. She was obliged to note that although the appellant sought refuge in the Queen Hill transaction, he was unable to present any relevant documentary evidence to support his assertions linking Mr Lewis to this real property transaction. The learned Resident Magistrate was correct in finding that the undertaking (exhibit 5) indicates that the appellant had converted the money to his own use or to the use and benefit of another person.

[64] It is noted that the undertaking was not one given to a court. However, it has to be interpreted as an acknowledgment by the appellant that he owes a debt, and is

promising to repay by the time stipulated. In view of the fact that the money ought to have been in his account, and ought to have been ready for immediate dispatch or return to the sender (barring bank hiccups), the promise to do so two and a half months hence gives the inference that it has been used in a manner inconsistent with the wishes of the sender. A promise or the expression of an intent to repay does not negate a fraudulent intent. In ***R v Gibson*** [1986] 23 JLR 499, monies were collected by the appellant from potential purchasers of real estate. He was the managing director of two companies; one was engaged in buying and selling real estate, the other in the development of two subdivisions. Deposits were paid to the first company on account of lands the appellant had falsely advertised for sale. However, these deposits, apart from one, were credited to the second company which had nothing to do with the first company. In fact, the second company's business was the appellant's personal subdivisions. Repeated requests for refunds were not heeded. The appellant fled the jurisdiction and was extradited to face charges under section 24 (1) (iii) (a) of the Larceny Act. The appellant contended among other things that there was no intention to deny the refunds which he was financially able and willing to make. It was held by this court that "the intention to defraud is established notwithstanding that the person inducing the payment may honestly intend to repay the money and even have good reason to believe that he will be capable of doing so" [page 500 C].

[65] The appeal fails on all grounds that have been filed and argued. The facts found by the learned Resident Magistrate are in keeping with the evidence presented. The findings of fact show a clear breach of the section under which the appellant was tried.

The appeal is accordingly dismissed and the sentence affirmed. The appellant has been on bail so the sentence commences as of now.