[2024] JMCA Crim 18

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CRIMINAL APPEAL NO COA2021PCCR00021

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE LAING JA (AG)

AUSTIN CUNNINGHAM v R

Hugh Wildman for the appellant

Ms Ashtelle Steele and Ms Judi-Ann Edwards for the Crown

13, 14 November 2023 and 26 April 2024

Criminal law — Evidence — Hearsay — Implied Assertions – Whether evidence of conduct of a non-witness should be excluded because it contains implied assertions of fact that the defendant solicited money

Corruption prevention -Corruption Prevention Act section 14(1)(a)

Criminal Law – Appeal – Application of proviso – Whether to be applied in the circumstances of the case – Judicature (Appellate Jurisdiction) Act, section 14(1)

LAING JA (AG)

[1] On 25 October 2017, the appellant was convicted in the Saint James Parish Court by Her Honour Mrs Natalie Hart-Hines (as she then was) ('the learned judge'), for breach of section 14(1)(a) of the Corruption (Prevention) Act ('the Act'). He was sentenced to four months' imprisonment at hard labour. The sentence was suspended for 12 months. The information on which he was convicted alleged that he being a public servant, a member of the Jamaica Constabulary Force ('JCF'), corruptly solicited $100,000.00 from Dwayne Chambers for the release of a blue Toyota Corolla motorcar registered 2300BG in the performance of his public functions. The appellant has appealed his conviction.

The evidence at the trial

The prosecution's case

[2] The prosecution relied on the evidence of seven witnesses as to fact, namely, Dwayne Chambers, Eric Graham, Superintendent Beau Rigabie, Inspector Collin Melanese, Detective Sergeant Nigel Pencil, Detective Corporal Latoya Tomlinson and Sergeant Cosmo Spence.

[3] The evidence of Eric Graham ('Mr Graham') was that, on 21 August 2010, he was driving a blue Toyota Corolla motorcar ('the car') along Bevin Avenue in Montego Bay, Saint James. His girlfriend and the complainant Dwayne Chambers ('Mr Chambers') were also in the car. While travelling along that roadway they encountered about six police officers. The police officers signalled Mr Graham to stop the car and he complied. A police officer, who was later identified to be the appellant, went to the window on the driver's side of the car and requested the documents related to the car. Mr Graham exited the car and handed the documents to the appellant.

[4] Mr Graham said that the appellant told him "yuh nuh see she [sic] dis yah cyar no good man". His response was that he would not know because it was not his car and that the appellant should ask Mr Chambers. Mr Graham said that he called Mr Chambers and after Mr Chambers began speaking with the appellant at the front of the car, he left and went to where his girlfriend was at the rear of the car.

[5] Mr Chambers' evidence supported that of Mr Graham as it related to the car being stopped and the documents being requested by the appellant. He explained that although he had purchased the car about three months before the day of the incident, he was not the holder of a driver's licence, and it was registered in the name of his cousin.

[6] Mr Chambers said that the appellant told him that he would "haffie go buy back the vehicle from him cause it nuh good, for One Hundred Thousand Dollars". Mr Chambers said his response was "not even fifty yuh mad" by which he meant $50,000.00.

[7] Mr Chambers testified that the appellant then called the wrecker which was nearby. The car was placed on the wrecker which left with the car aboard. Mr Chambers said he asked the appellant where the car was being taken and was told that it was being taken to Freeport. Mr Chambers said he asked the appellant if it should not be taken to the pound like the other vehicles that were not insured, and the appellant told him to give him his telephone number. The appellant told him to go home and when he reached home the appellant will call him. Mr Chambers then gave the appellant his telephone number.

[8] Mr Graham during evidence in chief said that after the car was placed on the wrecker the appellant called him and said "mi nuh like how yu fren a talk to me" but in cross examination admitted that he said "mi nuh like how yu fren sound". Mr Graham gave the appellant his telephone number and the appellant promised to call him. On his way home Mr Graham received a telephone call. The contents of the ensuing conversation were ruled to be inadmissible by the learned judge. After the conversation with the person on the phone Mr Graham spoke to Mr Chambers. Mr Graham also received another telephone call on 22 August 2010. He opined that the voice sounded like that of the person he had spoken to on the telephone while he was on his way home (on 21 August) and he again spoke to Mr Chambers after the second telephone conversation.

[9] On 23 August 2010 Mr Graham met with Detective Corporal Latoya Tomlinson and Detective Sergeant Nigel Pencil. Mr Graham was given $35,000.00, and Detective Sergeant Pencil placed surveillance and recording devices on the person of Mr Graham. The purpose of this was to gather evidence related to the conversations between Mr Graham and a person he had spoken to via telephone. Mr Graham entered a Honda motor car with the two police officers, and while in the car, he received two telephone calls. They travelled to the Best Care Pharmacy in Montego Bay. Mr Graham went inside the pharmacy and spoke with a person by the name of Eric Mathie ('Mr Mathie'). Mr Graham and Mr Mathie went inside the bathroom where Mr Graham handed the $35,000.00 to Mr Mathie who counted it and handed it back to Mr Graham. Mr Mathie then used his

telephone to make a call and Mr Graham walked outside. Detective Corporal Tomlinson and Detective Sergeant Pencil then entered and arrested Mr Mathie.

[10] A report was made to the Anti-Corruption Branch of the JCF by both Mr Chambers and Mr Graham and the appellant was arrested and charged with the offence of corruptly soliciting money contrary to section 14(1)(a) of the Act.

[11] On 2 August 2010 Sergeant Cosmo Spence, who was stationed at the Montego Bay Police Station, conducted an identification parade for the appellant who was at that time in custody. The appellant was pointed out by Mr Chambers as the police officer who has seized his car.

[12] The evidence of Superintendent Beau Rigabie ('Supt Rigabie') was that in August 2010 he was the Deputy Superintendent in charge of operations in Saint James which included responsibility for the quick response section. The appellant was a member of the quick response team on 21 August 2010. He said he saw the complainant's car that day on the compound of the police station. At about 4:00 pm, he made a check of the movement diary which was in the Motorised Patrol Office at the Montego Bay Police Station at Freeport. This diary is used to record events in relation to the quick response team and members of the motorised patrol team. He did not find any entry reflecting the car. He said that he also made a check of the general property book, which is kept in the guard room and is used to record all property taken to the police station by the police, but did not see an entry in respect of the car. He explained that it is the duty of a police officer who seizes a motor car which is taken to the police station to make an entry in the station diary as well as in the general property book. He conceded that he did not check the station diary which records the movement of persons and property.

[13] On 23 August 2010, after speaking to members of the anti-corruption branch of the JCF, Supt Rigabie placed a call to the appellant's cell phone and asked him to report to his office. When the appellant arrived at the office of Supt Rigabie, he was introduced to the members of the anti-corruption team. Inspector Melanese informed the appellant

of the allegations made against him which were that he seized the car and solicited money from the driver to avoid going to court. The appellant denied the allegations. Mr Graham was brought into the office and the allegations repeated by Inspector Melanese who identified Mr Graham as the driver of the car. Mr Graham then gave an account of what had transpired after which the appellant responded by saying "that was not how it went".

[14] Supt Rigabie said that Mr Mathie was then brought into the office and the appellant asked if he knew Mr Mathie. He said yes. Mr Mathie said he was told by the appellant to collect some money from a man but the money he collected "false" and so he told the man he did not want it. The appellant did not respond.

[15] Supt Rigabie said that Inspector Melanese then informed the appellant of the offences and cautioned him, after which, the appellant turned to Supt Rigabie and said "sorry for the embarrassment".

[16] In summary, the evidence of Inspector Melanese was that on 23 August 2010, while in the office of Supt Rigabie, he outlined the allegation of breach of the Act to the appellant and arrested and cautioned him. He said the appellant declared that he would like to explain himself and was further cautioned, after which he said "A dis man call me she [sic] him have some money fi give a man down a di pharmacy fi give me. I don't know what he was up to so me [sic] him fi come to the station". Inspector Melanese said that he summoned Mr Mathie into the office, pointed to the accused and asked him if he knew the accused. Mr Mathie replied that they had both worked at the Best Care Pharmacy and the appellant had asked him to collect some money from a man on his behalf.

[17] Inspector Melanese then summoned Mr Graham into the office and asked him if he knew the appellant and he said yes and that this was the same officer who seized his car on Saturday. Inspector Melanese said that he asked the appellant if he had made an entry in the station diary, or any other register and the appellant said no. The appellant

also said, "Mi sorry Supe fi let you down and sorry for the embarrassment mi cause the Jamaica Constabulary Force".

The appellant's case

[18] The appellant made an unsworn statement from the dock. He admitted that, on 21 August 2010, he was on motorcycle patrol conducting spot checks and the car which was being driven by Mr Graham was stopped. He requested that Mr Graham produce his driver's licence and the other documents in respect of the car. He stated that Mr Graham initially said that he could produce his driver's licence and the documents. However, when he asked Mr Graham to tell him one thing that should appear on the driver's licence, Mr Graham said his fingerprint. When he told Mr Graham that he was not convinced that he had a driver's licence, Mr Graham initially said he did but subsequently admitted that he did not have a driver's licence to drive the car. Accordingly, as a precautionary measure and for safety, he had the car towed by a wrecker to the Freeport Police Station.

[19] The appellant's account was that, at the Freeport Police Station, Mr Graham said "Officer I heard you told someone that you would be leaving work shortly, so how would I see you when I bring the documents? Do you have a contact number that you could give me?" The appellant said he told him yes and gave him his cell number hoping that he would call him the same evening. The appellant said he had left the key for the car in the patrol office in a desk drawer so that if Mr Graham called him, he would call the station guard and give him instructions to hand the vehicle over to Mr Graham. However, Mr Graham did not call him, and he went home.

[20] The appellant said that on Monday, 23 August 2010, he received a telephone call from Supt Rigabie and went to his office. Supt Rigabie informed him of the report that was made against him by Mr Graham in regard to soliciting and how they were disappointed with the report and how badly they felt about it and so he said "sorry about the whole disappointment and how bad they might feel, but I am not guilty of the allegation that was said". The appellant said when he was asked by Inspector Melanese what he was sorry for he explained that clearly and he also stated that the allegations

did not mean that he was guilty of anything. He denied being guilty and this is evident in the video recording that was an exhibit in court. The appellant maintained that he did not "solicit money or otherwise" from any of the witnesses in the case and was not guilty of the offence of soliciting of which he was accused.

The findings of the learned judge

[21] The findings of the learned judge on the material issues were stated at para 71 of her reasons and findings of facts. These are reproduced in full as follows:

> "I now set out my findings:
>
> (1) I have assessed the complainant's account and I am satisfied that I can rely on the account he has given. I find the complainant to be credible and believe his account that the defendant solicited the sum of $100,000 from him, contrary to section 14(1)(a) of the Act. I am also satisfied that the complainant subsequently identified the defendant at an identification parade.
>
> (2) In addition to finding the complainant and Eric Graham to be credible, I find that Eric Graham corroborated the complainant's account that the vehicle was seized. I find that he took steps to hand over money to a person, so that the vehicle might be released.
>
> (3) I have also looked at the circumstances which seem to corroborate or support the complainant's account. These circumstances can be explained rationally only by the guilt of the defendant. When considered as a whole, the evidence leads to the inescapable conclusion that the defendant is guilty of the offence. These are the circumstances I have noted:
>
> 1. Money was given to Eric Mathie (albeit it was returned). I find that the claimant and his witness could not have known that Eric Mathie was Mr. Cunningham's friend or associate, and know where to go to find him, if they were not so directed by Mr. Cunningham.

2. The clandestine meeting in the bathroom at Best Care Pharmacy was to facilitate the acceptance of money for the release of the car.

3. The prescribed procedure as regards recording in the station and general property diaries the fact that a vehicle was seized, was not followed on Saturday 21st August 2010 or up to the time of the interview on Monday 23rd August 2010.

4. Mr. Cunningham admitted that he knew that one of the men would be going to the pharmacy.

5. I find that Mr. Cunningham's attempts to protect Eric Mathie from incriminating himself and to protect Eric Mathie from being prosecuted by saying (at minute 16;33) *'Him have nutting to do wid it'*, demonstrated that they are friends.

6. The act of removing the vehicle from River Bay Road to the police station is an act of seizure. There would [be] no good reason to deny seizing the vehicle if by doing so, he was acting in accordance with his duties, and properly, 'in the performance of his public functions[.]' Further, I have noted that he offered no plausible explanation for the failure to note the seizure of the car in the relevant station diaries.

7. His apology suggests a guilty mind as aforesaid."

The appeal

[22] The appellant's original ground of appeal challenged the conviction on the basis that it was unreasonable and cannot be supported by the evidence. On 19 January 2023 the following supplemental grounds of appeal were filed, and at the hearing of the appeal, Mr Wildman was permitted to abandon the original ground of appeal and rely on them.

"a) The Learned Parish Judge erred in law in failing to appreciate that no adverse inference could be drawn against the Appellant arising from the statement allegedly made by Mr. Matty [sic] against the Appellant in the presence of the police officers in Mr. Rigaby's

[sic] office given the fact the Appellant was under caution, and was not obliged to respond to any statement that Mr. Matty [sic] was alleged to have made.

b) The Learned Parish Judge erred in law in failing to appreciate that the statement allegedly made by Mr. Matty [sic] in which he stated that the accused had asked him to collect money, being a statement made in the presence of the police, the Appellant was not obliged to respond to that accusation, and therefore no adverse inference could be drawn against the appellant by the Learned Parish Court Judge.

c) The Learned Parish Judge erred in law in failing to appreciate that the actions of Mr. Matty [sic] could not implicate the Appellant, and any extra-judicial statement made by Mr. Matty [sic] against the Appellant could not be used as evidence against the Appellant.

d) The Learned Parish Judge erred in law when she stated in her findings and conclusion that the Appellant's apology in the circumstances of the case could be construed as an admission of guilt, having found in her findings that having examined the tape there was no evidence that the Defendant admitted guilt.

e) The Learned Parish Judge erred in law when she stated at paragraph 68 of her findings that she found that in seeking to deny the allegations made by the complainant, the Appellant made statements which were implausible or incredible and which she used as evidence amounting to guilt.

f) The Learned Parish Judge erred in law when she stated at paragraph 68 of her findings that the Appellant gave no explanation as to how Eric Graham would know that Eric Matty [sic] was affiliated with the appellant and why money was brought to Eric Matty [sic].

g) The Learned Parish Judge erred in law at paragraph 68 that [sic] by stating the appellant gave no explanation as to why money was offered to Eric graham [sic], and how Eric graham [sic] knew Eric Matty [sic] or why

money was brought to Eric Matty [sic] as casting a burden of proof on the Defendant which renders her conviction of the appellant incurably bad.

h) The Learned Parish Judge also erred in law in paragraph 71 of her findings when she stated that the Appellant's attempt to protect Eric Matty [sic] from incriminating himself and to protect Eric Matty [sic] from being persecuted [sic] by same, him having nothing to do with it, demonstrated the Appellant and Mr. Matty [sic] are friends, rendering the conviction incurably bad.

i) The Learned Parish Judge erred in law at paragraph 77 of her findings when she stated that even if she were to reject the evidence of the recording on the crown's case, the lack of record of seizure in the relevant diaries amounts to evidence of guilt."

Ground a- The Learned Parish Judge erred in law in failing to appreciate that no adverse inference could be drawn against the Appellant arising from the statement allegedly made by Mr. Matty [sic] against the Appellant in the presence of the police officers in Mr. Rigaby's [sic] office given the fact the Appellant was under caution, and was not obliged to respond to any statement that Mr. Matty [sic] was alleged to have made.

Ground b- The Learned Parish Judge erred in law in failing to appreciate that the statement allegedly made by Mr. Matty [sic] in which he stated that the accused had asked him to collect money, being a statement made in the presence of the police, the Appellant was not obliged to respond to that accusation, and therefore no adverse inference could be drawn against the appellant by the Learned Parish Court Judge.

Ground c- The Learned Parish Judge erred in law in failing to appreciate that the actions of Mr. Matty [sic] could not implicate the Appellant, and any extra-judicial statement made by Mr. Matty [sic] against the Appellant could not be used as evidence against the Appellant.

[23] Grounds a, b and c are related. They are concerned with the treatment by the learned judge of the evidence related to Mr Mathie. All three grounds directly or indirectly question the admissibility and use by the learned judge of the statements made by Mr Mathie in the presence of the appellant while they were in the office of Supt Rigabie. However, ground c, additionally, deals with the evidence of the "actions" or conduct of

Mr Mathie at the pharmacy. Because of the overlap among these three grounds, we have considered them together and in doing so we have consolidated the submissions of counsel.

Submissions by the appellant

[24] Mr Wildman, on behalf of the appellant, submitted that the evidence of what transpired at the pharmacy and in particular the conduct of Mr Mathie in accepting money was inadmissible since it was both irrelevant and inadmissible hearsay. Accordingly, it could not be used as a basis for the learned judge to conclude that the appellant was "part of a criminal enterprise" in breach of the Act.

[25] Mr Wildman argued that the evidence of the conduct of Mr Mathie at the pharmacy constituted an implied assertion of the appellant's involvement and guilt which was inadmissible because it was in breach of the hearsay rule. In support of this argument, counsel relied on the case of **R v Kearley** [1992] 2 AC 228 ('**Kearley**').

[26] Mr Wildman advanced the position that the learned judge erred in attaching any weight to the evidence of the statements made by Mr Mathie in the presence of the appellant. He argued that no adverse inference could be drawn from the appellant remaining silent after the statement, which was allegedly made in the appellant's presence in Supt Rigabie's office by Mr Mathie, that the appellant had asked him to collect money. Counsel highlighted the fact that Mr Mathie was not called as a witness at the trial and, accordingly, the statements attributed to him constituted an allegation in the presence of the appellant and was not evidence against the appellant.

[27] Counsel submitted that, furthermore, the extrajudicial statements made in the absence of the appellant by Mr Mathie, as a co-accused, could not be evidence against the appellant. He relied on the cases of **R v Gunewardene** [1951] 2 KB 600 and **Dennis Lobban v R** [1995] 1 WLR 877 in support of this position.

[28] In his oral presentation, Mr Wildman submitted that even where accusations are made in the presence of an accused, if there is no evidential value to be derived from the

accusation, then it ought not to be led by the prosecution since the evidence is more prejudicial than probative. He argued that in the instant case the evidence can be seen as prejudicial because Mr Mathie was not called as a witness and the appellant denied guilt. Accordingly, other than the inadmissible statement of Mr Mathie there was no evidence against the appellant, and this remained the position during the trial.

[29] He argued that the appellant was entitled to rely on his common law right to be silent in the face of such an accusation. In support of this position counsel relied on the cases of **Dennis Hall v R** (1970) 12 JLR 240, **Donald Parkes v R** (1976) 14 JLR 261 and **R v Latty and Smith** (1988) 25 JLR 119.

[30] He further submitted that because this portion of the evidence was crucial, the learned judge was under a duty to address it by an express direction and to indicate whether it had any effect on her mind as the tribunal of fact and law. This duty extended to an obligation to make it clear that no adverse inference could be drawn from the appellant remaining silent, and that this should not have been left for speculation. He argued that it was incumbent on the learned trial judge to address her mind to these issues in her findings, and that her failure to do so resulted in the appellant being denied a fair trial.

[31] Counsel argued that in such an instance where evidence is not properly led the appeal court could intervene and quash the conviction and, on this point, he relied on the cases of **R v Christie** [1914] AC 545 ('**Christie**') and **R v Collins; R v Keep** [2004] 1 WLR 1705.

[32] Counsel advanced the position that this case was not an appropriate one for the application of the proviso in section 14(1) of the Judicature (Appellate Jurisdiction) Act ('the proviso') because it was not a case in which one could say that notwithstanding the misdirection or non-direction the conviction could be upheld. In support of this submission counsel relied on the case of **Fazal Mohammed v The State** (1990) 37 WIR 438.

Submissions by the Crown

[33] Ms Edwards, in response for the Crown, submitted that the learned judge was correct in her approach of admitting into evidence the statements of Mr Mathie and determining the weight to be attached to them. She said that Mr Mathie was not a co-conspirator because the conspiracy charge was withdrawn against him. Counsel argued that, in light of this, the appellant could not successfully argue that he was in the same position as that which existed in **Lobban**, where both accused were charged and tried together for murder.

[34] Ms Edwards argued that although the learned judge admitted Mr Mathie's statements, she gave no weight to them in coming to her conclusion that the appellant was guilty. She further argued that this is evidenced by the fact that nowhere in the learned judge's reasons and findings of fact does she mention the statements made by Mr Mathie and what if any weight she gave to them. It was posited that the fact that the learned judge did not mention the statements indicates that she placed no weight on them. Counsel quoted para. 67 of the reasons of the learned judge in support of this position.

[35] Counsel also sought to distinguish **Kearley** on the basis that in **Kearley** the prosecution sought to rely on an out of court conversation and this was found to be hearsay. However, in the instant case, the evidence of Mr Graham constituted a chronological account of what took place in relation to Mr Mathie's conduct at the Pharmacy in receiving the money.

[36] Ms Edwards also posited that **Christie**, on which Mr Wildman relied, did not support the appellant's argument that Mr Mathie's statements were inadmissible. This she said was because the issue before the learned judge in the instant case was whether the statements made in the presence of the appellant were admissible to assess, *inter alia*, the behaviour of the appellant on hearing the statements. Counsel submitted that in **Christie** it was held that there is no rule of law that evidence of a statement made in the presence and hearing of the accused is not admissible as having a bearing on the conduct

of the accused unless he accepts the statement. Counsel said that this was illustrated by the fact that in **Christie** it was held that the relevant statement was admissible in relation to the demeanour of the appellant, although the conviction was quashed on the basis of the learned judge's misdirection on how the statement could properly be used.

[37] Ms Edwards submitted that the statements were not prejudicial to the appellant because the appellant by his own admission, at page 106 of the transcript of the video recording, indicated that he had a conversation with Mr Graham regarding Mr Graham going to Mr Mathie.

[38] Ms Edwards contended that there was nothing in the notes of evidence to indicate that an adverse inference was drawn by the learned judge from the appellant remaining silent. She argued that the appellant's silence did not form a basis for the learned judge's finding that the appellant was guilty. Counsel argued that the learned judge was aware of the appellant's right to remain silent, despite not specifically warning herself on the issue.

[39] Ms Edwards also submitted that if the court concludes that the learned judge ought to have given an express warning in relation to her treatment of the evidence of the statements and failed to do so, the court should consider the evidence as a whole in order to determine whether or not the appellant was so prejudiced by it, that this led to a miscarriage of justice. Counsel submitted that on the evidence there was no miscarriage of justice, and the learned judge would inevitably have arrived at the same conclusion as to the guilt of the appellant, accordingly, the court should apply the proviso. In support of the submission on this point, counsel relied on the case of **R v Gilbert** (1978) 66 Cr App R 237 where the court in exercising its discretion to apply the proviso dismissed the appeal on the basis that there was no miscarriage of justice.

Discussion and analysis

[40] In our view, the foregoing grounds of appeal can be more efficiently addressed by the consideration of the following issues:

1. Whether the evidence of Mr Graham in relation to the conduct of Mr Mathie in collecting money is admissible.

2. Whether the evidence of what Mr Mathie said in the appellant's presence is admissible and if so, what is its legal effect.

[41] The hearsay rule is a highly technical rule of evidence. There are various formulations of the rule, however, the definition proposed by the authors of Cross on Evidence, 6th ed, page 454, accurately captures the rule and states that: "an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted". Although this definition might appear to cover express assertions only, it is now settled that the hearsay rule encapsulates implied assertions as well.

[42] In **Glinski v McIver** [1962] 1 All ER 696 at page 723 the House of Lords identified customary devices that were used to circumvent objections that evidence was inadmissible based on hearsay or other rules of evidence and one such device was the use of questions with "yes" or "no" answers as to what was done by the witness. This was illustrated in the following manner:

> (Just answer "Yes" or "No": Did you go to see counsel? Do not tell us what he said but as a result of it did you do something? What did you do?) This device is commonly defended on the ground that counsel is asking only about what was done and not about what was said. But in truth what was done is relevant only because from it there can be inferred something about what was said. Such evidence seems to me to be clearly objectionable. If there is nothing in it, it is irrelevant; if there is something in it, what there is in it is inadmissible.

Accordingly, the submission on behalf of the Crown that Mr Graham was only giving evidence of the chronological sequence of the events at the pharmacy, and not what was said by Mr Mathie, does not provide an automatic gateway for the admissibility of his evidence in this regard, because it bears the risk of a prejudicial implied assertion being introduced.

[43] The possible prejudice posed by implied assertions is aptly demonstrated in the case of **Hopson (Delroy) v R** (1994) 45 WIR 307, a decision of the Privy Council on appeal from this court. In that case, the appellant was charged with murder. There was evidence of a purported eyewitness, Bloomfield, who said he heard gunshots and saw a man on the ground with another man whom he recognised as the appellant, standing over him, armed with a gun. He said he chased the appellant but abandoned the chase after the appellant turned and fired shots at him, and he returned the fire. A second witness, Mitchell, said that he joined the chase and when the man turned around, he realised that it was the appellant.

[44] A police officer gave evidence that he visited the hospital on the night of the shooting and spoke to the victim who told him something and thereafter he decided to look for someone in particular. He further stated that after visiting the hospital, he visited the scene of the crime and spoke to Bloomfield and Mitchell. Thereafter, he prepared a warrant for the arrest of the appellant.

[45] Before the jury retired, the foreman asked the judge why what was told to the police officer by the victim could not be revealed in court. The learned judge's explanation to the jury included the following:

> "No evidence can be given about what was said, because the [appellant], presumably, was not present. If he had been present, what was said could have been said; so please don't consider it. You remember that the corporal said that – the corporal even went as far as to say that after "I spoke to [the victim] and he spoke to me I left the hospital with the intention of looking for somebody". Well, you can't – you know, you have to be careful how you use that piece of evidence. Suffice it to say that the next day he got a warrant for [the appellant]. You have to be very careful about that aspect of the case and I ask you to consider your verdict now. I hope I have explained it satisfactorily."

[46] The Board in its reasons which were delivered by Lord Nolan, disagreed with the conclusion of this court that the explanation of the judge taken as a whole must have

conveyed to the jury that that they should ignore this aspect of the evidence of the police officer. The Board explained the impact of the evidence in the following manner:

> "The evidence of Cpl Grant that the victim had told him something, followed by the question: 'After what he told you, corporal, did you make any decision to look for anybody in particular?' and the answer 'Yes, sir' could only be understood as implying that the victim had named the appellant as his attacker. It is true that Cpl Grant went on to speak to Bloomfield and Mitchell before he took out a warrant for the appellant's arrest, but that could not serve to displace the implication of the earlier question and answer. The foreman of the jury must surely have had this implication in mind when he asked the judge why the jury could not be told what the victim had said. The judge's reply, including the words 'suffice it to say that the next day he got a warrant for [the appellant]' left it open to the jury to conclude that the statement of the victim to the corporal could be added to the evidence of Bloomfield and Mitchell identifying the appellant as the murderer."

The Board concluded that having regard to the inconsistencies in the evidence of Mitchell, the evidence of the police officer may have been a critical factor in the jury's decision, and the possibility of a substantial miscarriage of justice could not be excluded. Consequently, the advice to Her Majesty was that the appeal against conviction and sentence should be allowed.

[47] In **Kearley** the House of Lords reaffirmed the view that hearsay also applies to implied assertions and Lord Oliver of Aylmerton, at page 261, formulated the relevant question as being whether the evidence was "being tendered simply as evidence of the fact of the conversation or was it introduced 'testimonially' in order to demonstrate the truth either of something that was said or of something that was implicit in or to be inferred from something that was said?".

[48] At common law the hearsay rule applies to verbal statements. There are very few common law authorities which confirm that it also applies to purely non-verbal conduct. One authority which has been repeatedly discussed in this context is the case of **Chandrasekera v R** [1937] AC 220, a Privy Council case on appeal from Ceylon. A victim

was found conscious with her throat slashed and this wound rendered her unable to speak. She suggested the identity of the perpetrator by signs and when his name was mentioned to her, she responded by nodding her head. She subsequently died and this evidence was admitted under a provision of the Ceylon Evidence Ordinance which allows the admission of verbal or written statements by a person who is dead or who cannot be found. Their Lordships were of the opinion that this evidence of conduct was properly admitted pursuant to the evidence ordinance, and that her nod constituted a verbal statement made by her which is closely akin to a person who is verbally impaired using sign language. Their Lordships also found that the other evidence as to signs she made was admissible to provide context as to why the accused's name was put to her for her to confirm whether he was the perpetrator.

[49] In our view, although ultimately the treatment of the disputed evidence in the case of **Chandrasekera v R** turned on its particular facts, the approach taken therein is still relevant to the case before this court. This is so because the signs used by the victim were treated as hearsay and were admitted only by operation of the special exception provided under the applicable evidence act. Accordingly, there is nothing to derogate from what we consider to be a legally sound principle, that an out of court act done in the absence of an accused person is inadmissible if it is being tendered as evidence of the truth of any assertion or of any implied assertions which can be inferred from that act. In fact, even where an act is done or words are spoken in the presence of the accused, it is not automatically relevant and admissible evidence. It is the accused's reaction by words or conduct, or non-reaction where one is reasonably expected, that may or may not make it so.,

The evidence of Mr Graham in relation to his interaction with Mr Mathie

[50] There were two sources of evidence relating to Mr Mathie and his collection of money. The first was the evidence of Mr Graham detailing his interaction with Mr Mathie in which he handed money to Mr Mathie. The second was the evidence of the witnesses Supt. Rigabie and Inspector Melanese recounting the statement of Mr Mathie (the

recording of which was also admitted into evidence), in which Mr Mathie alleged that the appellant had asked him to collect some money from a man on his behalf, which he did initially but returned it. As it relates to the evidence of Mr Graham, Mr Wildman submitted that it contained an implied assertion that was prejudicial to the appellant and in support he relied on the case of **Kearley**.

[51] **Kearley** was a case involving implied assertions. In that case, the appellant was charged on indictment with a number of offences including possession of a controlled drug with intent to supply. He pleaded not guilty. At the trial, the prosecution sought to call evidence of police officers that, following the appellant's arrest, numerous telephone calls had been made to his house in which the callers requested to speak to him and asked to be supplied with drugs. The prosecution also wished to tender evidence that seven people also attended the house asking for the appellant and expressing a desire to purchase drugs. None of those persons who made the telephone calls or who visited the house were called to give evidence. The appellant objected to the admission of the words spoken on the ground that they were inadmissible and in breach of the hearsay rule. The appellant also objected to the admission of the evidence that telephone calls were made and that persons visited the home, (even if the evidence of what was said was excluded), on the ground that this would have provided no proof of the guilt of the appellant and would, accordingly, be irrelevant. The learned judge overruled the objections and permitted police officers to give evidence of the callers' requests. The appellant was convicted, and the Court of Appeal (Criminal Division) dismissed his appeal against conviction.

[52] On his appeal to the House of Lords the appeal was allowed (Lord Griffiths and Lord Browne-Wilkinson dissenting). The court's reasons are accurately and succinctly captured in the head note as follows:

> "…in so far as the callers' requests for drugs merely manifested the callers' state of mind, viz. their belief or opinion that the appellant would supply them with drugs, such state of mind was irrelevant and evidence as to it was,

> accordingly, inadmissible; and that, in so far as the callers' requests could be treated as having impliedly asserted the fact that the appellant was a supplier of drugs, evidence of the requests was excluded by the rule against hearsay, since that rule applied equally to implied as to express assertions, and the fact that a multiplicity of requests for drugs might have greater probative force than a single request was not a ground for disregarding it."

[53] Since evidence is inadmissible as hearsay only where it is relied upon as "evidence of any matter stated", that is, where it is sought to establish the truth of that matter, the question is raised as to the purpose of the evidence of Mr Mathie's conduct in accepting money. Was it tendered, as was the position that counsel for the Crown advanced, simply as evidence of the chronology of events which included the interaction between Mr Graham and Mr Mathie? Or was it introduced "testimonially" in order to demonstrate the truth of an implied assertion that Mr Mathie was collecting money on behalf of the appellant and at his instruction?

[54] It is of paramount importance that there was no properly admitted evidence before the learned judge that the appellant had asked Mr Graham to pay money to Mr Mathie. The learned judge did not permit Mr Graham to give evidence of the identity of the person whose voice he heard on the telephone after the car was seized, and for this reason neither could the learned judge have admitted the contents of those conversations. Furthermore, Mr Graham admitted during cross examination that the appellant did not ask him to give him any money.

[55] The evidence that Mr Mathie collected money could only be relevant and admissible if it served to prove an issue in the case. Mr Graham's evidence that he met with Mr Mathie at the pharmacy and gave him money, if taken by itself, is therefore irrelevant because there is no nexus between that event and the appellant. The fact that Mr Mathie collected money, if admitted in a vacuum without any evidence of a statement by Mr Graham or Mr Mathie of a request by the appellant for Mr Graham to make such a payment, or for Mr Mathie to collect such payment, is of no relevance in proving the appellant's involvement.

[56] The learned judge found as a fact that Mr Mathie collected money (and returned it). It appears to us that the admissibility of evidence of Mr Mathie's conduct in collecting money could only have been considered by the learned judge to be potentially probative and relevant if the learned judge considered that it was justified on either of two grounds (or both). Firstly, if the act of collecting money was deemed to contain an implied assertion that it was the appellant who directed Mr Graham to pay and Mr Mathie to collect money on his behalf (the purpose of which was to release the car). Secondly, if the conduct of Mr Mathie in collecting money was viewed as otherwise capable of constituting circumstantial evidence in a chain pointing to the appellant's guilt, or evidence corroborative of his guilt.

[57] The distinction between these two grounds is very difficult to identify, especially on the facts of this case. The learned judge appears to have relied on the second ground which is reflected in her statement that she looked at circumstances which seem to corroborate or support the complainant's account and which "can be explained rationally only by the guilt of the defendant". Included among these circumstances on which the learned judge relied, and which is noted by her at para. 71(3)1 is the fact that "Money was given to Eric Mathie (albeit it was returned)". However, in the absence of any express statement by the learned judge, it is difficult to distil from her review of the evidence and her findings of fact what was the legal basis on which she made the specific finding that "Money was given to Eric Mathie (albeit it was returned)".

[58] If such a conclusion was based on the learned judge treating the evidence of Mr Graham giving money to Mr Mathie as circumstantial evidence to support the conclusion that this was at the request of the appellant, this approach was flawed. We have not been directed to, nor have we been able to identify any common law authority which can support the admissibility of the evidence of Mr Graham that Mr Mathie collected money in the absence of the appellant, on the basis that it constitutes circumstantial evidence.

[59] The obvious risk in the admission of out of court conduct as circumstantial evidence, is that the hearsay rule could be circumvented by the tribunal using in its

deliberations, the same act which is excluded by the hearsay rule if it is tendered as direct evidence. It is noteworthy that in **Kearley** the fact of the telephone calls to the home of the appellant would have easily lent itself to being used as circumstantial evidence, however the majority of the court did not use this as an acceptable route for the admissibility of that evidence.

Conclusion on the evidence from Mr Graham of Mr Mathie's conduct at the pharmacy

[60] It is our opinion that the evidence of Mr Graham that Mr Mathie collected money in the pharmacy, and returned it, was inadmissible hearsay, because it contained a prejudicial implied assertion that it was the appellant who instructed Mr Graham to make that payment and instructed Mr Mathie to collect the money. We are also of the view that such evidence could not properly have been admitted on the basis that it seemed to "corroborate or support the complainant's account", because there was no evidence coming from Mr Graham or Mr Chambers that the appellant requested that money be paid to Mr Mathie.

The admission of the evidence of the statements by Mr Mathie in the appellant's presence

[61] Mr Wildman has also complained in respect of the use by the learned judge of Mr Mathie's admission, in the presence of the appellant, that the appellant had asked him to collect money.

[62] At page 28 of the notes of evidence, Mr Fairclough, who acted for the appellant at the trial, objected to the admission of the evidence of Inspector Melanese relating to the statements made by Mr Mathie in the presence of the appellant, on the basis that Mr Mathie should be called as a witness so that his account or statement could be challenged. The learned judge in her ruling stated that:

> "It is permissible to have the statement made in the presence and hearing of Defendant admitted. The question of whether there is any truth to the statement and weight to be attached [is] to be decided. The statement can at this point be admitted on the basis that it was made but not for the truth of the statement. I will need to warn myself."

[63] Mr Morrell Beckford, co-counsel for the appellant at the trial, also highlighted the undesirability of the video recording of Mr Mathie's statement being admitted into evidence. The exchange between himself and the learned judge is noted at page 36 of the notes of evidence at lines 16-21:

> "Mr. Beckford asked for the DVD to be paused and it is. Mr. Beckford indicates that Mathie is no longer a part of this case and there is no conspiracy charge and he is wondering whether or not this portion of the disk could be edited.
>
> RM: However it cannot be edited now, I can hear it and disabuse my mind of it or perhaps fast forwarded but when I take it to consider I wont [sic] know where to stop etc."

[64] Despite the learned judge's appreciation of the issue which was raised concerning the admissibility of evidence from a third party of the statements attributed to Mr Mathie and the question of the limited purpose to which they could be put, she neglected to warn herself of this limitation in her reasons and findings of fact.

[65] The evidence of Mr Mathie's statements was only admissible for the limited purpose of assessing the appellant's reaction to them. In our view the contrasting submissions of counsel in relation to the relevant law that is to be distilled from the case of **Christie** are addressed by the following extract from the judgment of Lord Atkinson, at pages 554 to 555 of **Christie**, where he opined as follows:

> "…the rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save so far as he accepts the statement, so as to make it, in effect, his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct, or demeanour at the time when a statement was made amounts to an acceptance of it in whole or in part. It by no means follows, I think, that a mere denial by the accused of the facts

> mentioned in the statement necessarily renders the statement inadmissible, because he may deny the statement in such a manner and under such circumstances as may lead a jury to disbelieve him, and constitute evidence from which an acknowledgment may be inferred by them. Of course, if at the end of the case the presiding judge should be of opinion that no evidence has been given upon which the jury could reasonably find that the accused had accepted the statement so as to make it in whole or in part his own, the judge can instruct the jury to disregard the statement entirely."

[66] We have previously made reference to the fact that it is unclear from the learned judge's reasons, what is the legal basis on which she made the finding of fact that "Money was given to Eric Mathie (albeit it was returned)". We have previously addressed why in our view such a finding would be flawed if it was based on the evidence of Mr Graham. However, if this finding of fact was based on the evidence of Supt Rigabie and Inspector Melanese or the video recording of the statements Mr Mathie made in the presence of the appellant, and the appellant's reaction to the statements, then it was incumbent on the learned judge to indicate that in her findings of fact. This is so considering that it is not entirely clear that the appellant by his reaction to the statements accepted the statement that he asked Mr Mathie to collect money as true.

[67] These principles also apply where the statements are made by a co-accused, but in this case that is not a relevant issue. We agree with the submissions on behalf of the Crown that Mr Mathie could not be considered to be a co-accused of the appellant.

[68] We also agree with the submissions of counsel for the Crown that there is no indication in the reasons of the learned judge that she drew an adverse inference from the silence of the appellant in response to the statement made in his presence by Mr Mathie. At para. 67 of the learned judge's findings, she stated that:

> "The law affords a defendant protection from being associated with an admission or confession made by a co-defendant unless the defendant adopted the statement by his word or conduct. Counsel Mr Beckford requested that the court disregards the entire statement made by Mr Mathie when he entered the room. However even when

> the statements made are disregarded, it is noted that the defendant implicitly acknowledged a connection between himself and Eric Mathie. Although the [appellant] was warned that he had the right to remain [sic] he elected to comment on statements made, where he felt they called for some response."

Conclusion on the admission of Mr Mathie's statements

[69] The recording of what took place after Mr Mathie spoke clearly demonstrates that the appellant was cautioned and proceeded to give an explanation. In such circumstances we find that there is no merit in these grounds of appeal insofar as the complaint is that the appellant's silence in reaction to the statements was used against him by the learned judge.

[70] In our opinion, the learned judge sitting by herself was permitted to allow the admission into evidence of the statements by Mr Mathie. Once the statements had been admitted, the learned judge sitting as judge and jury, was entitled to consider whether there was any evidence from which the appellant's acceptance in whole or in part of the statements could be inferred. However, it was incumbent upon the learned judge to expressly indicate whether her finding that Mr Mathie collected money was based on the appellant's reaction to the statements by Mr Mathie in his presence. We are of the view that the learned judge's failure to explain the basis of her conclusion that Mr Mathie accepted money was a material error because this was an important finding which may have had an impact on the verdict of guilty.

[71] The learned judge concluded that the appellant's reaction in the form of an apology, was evidence of a guilty mind, and this conclusion is the subject of a separate ground of appeal which we will address below.

Ground d- The Learned Parish Judge erred in law when she stated in her findings and conclusion that the Appellant's apology in the circumstances of the case could be construed as an admission of guilt, having found in her findings that having examined the tape there was no evidence that the Defendant admitted guilt.

Submissions by the appellant

[72] In advancing his submissions on this ground, Mr Wildman contended that the learned judge, in having previously accepted that the appellant did not confess to the offence, contradicted herself by later finding that the "[appellant's] apology suggests a guilty mind".

[73] Mr Wildman argued in his oral presentation that the offence is not made out by showing "guilty mind". He stated that there must be an *actus reus* and *mens rea*. There must be proof of the taking of the money, soliciting and also intentional dishonesty. He submitted that this was not established in this case as up to the time of the discussions in Supt Rigabie's office there was no incriminating evidence which the appellant could be called upon to defend. The Crown, he argued, did not make out a *prima facie* case against the appellant, but instead a case based on mere suspicion which he stated was not sufficient to ground a finding of guilt. In the circumstances he submitted the learned judge erred as there was no credible evidence to support such a finding. As such, counsel asked this court to intervene and quash the conviction.

Submissions by the Crown

[74] The position of Ms Edwards was that the learned judge's comment that the appellant did not "directly confess" does not run counter to her finding that the appellant's apology could be viewed as evidence of guilt. She argued that in making her assessment of the apology the learned judge did not only look at the apology as proof of guilt, but also the circumstances under which the apology was made. Counsel pointed out that the learned judge warned herself that the apology did not constitute an admission of guilt, but she found that the circumstances of the apology, in that it was spontaneously given without being prompted, implied a guilty mind. Counsel submitted that in adopting such an approach the learned judge was correct in her assessment of the apology.

Analysis

[75] We have previously included a narrative of what the appellant said after the allegations of soliciting money were put to him and his unsworn statement in which he said, "sorry about the whole disappointment and how bad they might feel, but I am not guilty of the allegation that was said…"

[76] We have also have previously addressed the ability of the learned judge to consider whether there was any evidence from which the appellant's acceptance in whole or in part of the statements of Mr Mathie could be inferred. We are of the view that there is no inconsistency in the learned judge finding on one hand that the appellant did not admit guilt but on the other hand that his reaction was evidence of a guilty mind. In fact, the point is made clearly by Lord Atkinson in the statement to which reference has previously been made that:

> "It by no means follows, I think, that a mere denial by the accused of the facts mentioned in the statement necessarily renders the statement inadmissible, because he may deny the statement in such a manner and under such circumstances as may lead a jury to disbelieve him, and constitute evidence from which an acknowledgment may be inferred by them."

[77] It is our opinion that the learned judge was entitled to conclude, as she did, that the apology by the appellant for causing embarrassment to his superiors, in the circumstances in which it was given, implied a guilty mind on the part of the appellant.

[78] To the extent that Mr Wildman's submissions also suggest that the judge was only focused on the "*mens rea*" while ignoring the absence of any evidence of the "*actus reus*", we do not find any merit in his submissions. In the first paragraph of her reasons and findings of fact, the learned judge identified the essential elements of the offence of corruptly soliciting money contrary to section 14(1)(a) of the Act which the prosecution was required to prove. These were that the appellant solicited money for doing any act or omitting to do any act in the performance of his public functions and acted corruptly in so doing. At para. 71 the learned judge made it expressly clear that she was satisfied

that the complainant was credible and believed his account that the appellant solicited the sum of $100,000.00 from him contrary to the Act. The learned judge found that the appellant's conduct in seizing the car was in the performance of his duties. She concluded that it was the appellant who solicited money for the release of the car and not Mr Graham and Mr Chambers who offered to pay money to him through a third party.

Ground e- The Learned Parish Judge erred in law when she stated at paragraph 68 of her findings that she found that in seeking to deny the allegations made by the complainant, the Appellant made statements which were implausible or incredible and which she used as evidence amounting to guilt.

Ground f- The Learned Parish Judge erred in law when she stated at paragraph 68 of her findings that the Appellant gave no explanation as to how Eric Graham would know that Eric Matty [sic] was affiliated with the appellant and why money was brought to Eric Matty [sic].

Ground g- The Learned Parish Judge erred in law at paragraph 68 that by stating the appellant gave no explanation as to why money was offered to Eric Graham, and how Eric graham [sic] knew Eric Matty [sic] or why money was brought to Eric Matty [sic] as casting a burden of proof on the Defendant which renders her conviction of the appellant incurably bad.

Submissions by the appellant

[79] Mr Wildman submitted that the learned judge misconstrued the case of the appellant and made findings adverse to him based on his explanation. Counsel argued that in doing this, the learned judge failed to appreciate that even if she did not accept the explanation or the defence of the appellant, this did not automatically mean that she ought to conclude that he was guilty.

[80] Counsel argued that this was compounded by the burden cast on the appellant by the learned judge to explain how the appellant and Eric Mathie knew each other or why money was brought to Eric Mathie. He submitted that it is the prosecution that must prove the issues in the case, and in placing that burden on the appellant the learned judge committed an egregious error resulting in the conviction being bad.

Submissions by the Crown

[81] In disagreeing with the submissions of Mr Wildman on this ground, Ms Edwards highlighted paras. 72, 74 and 76 of the learned judge's reasons and findings of fact. Counsel argued that nowhere in the reasons and findings of facts did the learned judge indicate that the explanation of the appellant amounted to guilt on the part of the appellant, although she found the explanation to be implausible. Counsel also argued that the learned judge did not find that the appellant was guilty because no explanation was given by him as to how he and Mr Mathie were affiliated or why money was given to Mr Mathie.

[82] The position advanced by Ms Edwards was that the learned judge merely commented on the case of the appellant and that the comments did not form a part of her conclusion. According to counsel, the comments of the learned judge were based on the evidence that was before her. Ms Edwards argued that the learned judge assessed the Crown's case, considered the appellant's version of the events, and in the end found his version lacking. Counsel submitted that in the circumstances the comments of the learned judge were appropriate as they formed a part of the reasons for rejecting the appellant's version.

[83] Furthermore, it was submitted on behalf of the Crown that the learned judge did not place any burden on the appellant. Ms Edwards argued that, in returning to the Crown's case at para. 77 after assessing the appellant's case and rejecting it as being implausible, the learned judge appreciated that the burden of proof is on the Crown.

Analysis

[84] During the interview in the office of Supt Rigabie the appellant was confronted with the statement of Mr Mathie and the appellant explained that the person who spoke to Mr Mathie (which we understand to be a reference to Mr Graham), told the appellant that he knew Mr Mathie. The appellant said that he realized that Mr Graham was up to something, and he could not allow Mr Graham to come and "face him with certain things",

so he told Mr Graham that if [he] "want guh to that man fine, whatever". However, the appellant also said that he told Mr Graham that he should come to the station to see him because he was waiting on him.

[85] Therefore, there were two possibilities which could serve to explain Mr Graham's conduct in going to meet Mr Mathie. The first, was that Mr Graham was instructed to take money to Mr Mathie at the pharmacy. The second, was that Mr Graham of his own accord and without any suggestion by the appellant, decided to see Mr Mathie about the issue of the seizure of the car and told the appellant that he would be doing so, to which the appellant told him that he could if he wanted to, but he needed to see the appellant at the police station. It was wholly open to the learned judge as the judge of fact, to find that the second scenario as proffered by the appellant in his response was implausible or incredible.

[86] It is a fundamental principle of the criminal law that it is the duty of the prosecution to prove the guilt of an accused person beyond reasonable doubt. In determining whether the prosecution had discharged its duty to the requisite standard, it was the function of the learned judge in this trial to decide whether the unsworn statement of the appellant had value and if so, what weight should be given to it. In conducting that exercise of determining the credibility of the appellant and the veracity of the assertions in the unsworn statement, one of the tools which was available to the learned judge was to compare the appellant's unsworn statement with the evidence of the other witnesses especially where this was uncontested and clearly shown to have occurred. It was not disputed that Mr Graham went to see Mr Mathie, and accordingly, it was open to the judge to conclude that this was on the instructions of the appellant, and that this was connected to the appellant's act of soliciting.

[87] The question which would naturally arise for any tribunal of fact would be on what basis would Mr Graham conclude that seeing Mr Mathie would be beneficial, if it was the case that he was not given those instructions. In saying at para. 68 of the record of proceedings, "Also, no explanation was offered as to how Eric Graham would know that

Eric Mathie was affiliated with the defendant, or why money was brought to Eric Mathie", the learned judge in our view was indicating that this was a question that occupied her mind. She clearly considered the absence of any information which could serve to explain why Mr Graham might have had a reason to contact Mr Mathie on his own initiative. In the absence of any such information coming from the appellant or any other source, she concluded that the scenario proposed by the appellant of Mr Graham acting on his own accord was implausible or incredible and that a reasonable inference was that he was told to visit Mr Mathie.

[88] This does not suggest, as submitted by Mr Wildman, that the learned judge was reversing the burden of proof and placing it on the appellant. The learned judge was merely indicating the reasoning process by which she rejected the appellant's account and the context in which the conduct of Mr Graham made sense. This is reflected in her finding at para. 71(3)1 as follows.

> "... I find that the claimant and his witness could not have known that Eric Mathie was Mr. Cunningham's friend or associate, and know where to go to find him, if they were not so directed by Mr. Cunningham."

Conclusion

[89] We are of the view that the learned judge's approach to the analysis of the facts on this issue was sensible and permissible and we do not find any merit in this ground of appeal.

Ground h - The Learned Parish Judge also erred in law in paragraph 71 of her findings when she stated that the Appellant's attempt to protect Eric Matty [sic] from incriminating himself and to protect Eric Matty [sic] from being persecuted by same [sic], him having nothing to do with it, demonstrated the Appellant and Mr. Matty [sic] are friends, rendering the conviction incurably bad.

Submissions by the appellant

[90] The gravamen of the complaint raised by this ground concerns the findings of the learned judge at para. 71(3)5 of her reasons that the appellant attempted to protect Mr

Mathie from incriminating himself and attempted to protect him from being prosecuted. Mr Wildman argued that the learned judge concluded that the appellant saying that "him have nutting to do wid it" demonstrates that the appellant and Mathie are friends. Mr Wildman submitted that this statement did not mean that the appellant was asserting a friendship with Mr Mathie, or that he was or trying to prevent Mr Mathie from being prosecuted. Instead, it was the appellant's case that it was the "complainants" trying to set him up and not Mr Mathie.

Submissions by the Crown

[91] Ms Edwards, in responding on this ground relied on the authority of **Byfield Mears v The Queen** [1993] UKPC 13 which quoted with approval the words of Lord Sumner in **Ibrahim v R** [1914] AC 599, that the court would have to ask itself whether there was:

> "Something which…deprives the accused of the substance of a fair trial and the protection of the law, or which, in general terms, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent."

[92] It was submitted that the finding of the learned judge as to the friendship between the appellant and Mr Mathie did not deprive the appellant of a fair trial. The learned judge assessed the evidence and formed that view.

[93] It was further argued that in light of the exchange between the police and Mr Mathie in which the appellant interjected by reminding the police that Eric Mathie was under caution, the learned judge could not be faulted for interpreting the interaction to be one arising from a friendship and that the appellant was protecting Eric Mathie.

Analysis and conclusion

[94] When Mr Mathie was taken into the office of Supt Rigabie, the appellant was asked if he knew him. His response was that he knew his name to be Erick but could not

remember his surname. We accept that there is merit in Mr Wildman's submission that there was insufficient basis for the learned judge's conclusion at 71(3)5 where she said:

> "I find that Mr. Cunningham's attempts to protect Eric Mathie from incriminating himself and to protect Eric Mathie from being prosecuted by saying (at minute 16;33) *'Him have nutting to do wid it'*, demonstrated that they are friends."

[95] However, we do not find that the learned judge's conclusion that the relationship between the appellant and Mr Mathie was one of a friendship, prejudiced the defence. The key fact was that they were known to each other, and Mr Graham did not go to see a random individual. This undisputed evidence of a connection between the appellant and Mr Mathie, even if not rising to the level of friendship, would be sufficient to support a reasonable conclusion that Mr Graham's evidence that the appellant directed him to Mr Mathie was credible. Accordingly, we do not find any merit in this ground of appeal.

Ground i- The Learned Parish Judge erred in law at paragraph 77 of her findings when she stated that even if she were to reject the evidence of the recording on the crown's case, the lack of record of seizure in the relevant diaries amounts to evidence of guilt.

Submissions by the appellant

[96] Mr Wildman on his last ground submitted that the learned judge committed a fatal error at para. 77 of her reasons and findings of fact. Para. 77 reads as follows:

> "…I should indicate that, even if the recording of the interview ought to have been excluded, and even if I disabuse my mind of the statements made during the interview, I would still find that the crown has presented sufficient evidence for me to find the accused guilty, based on the evidence of the complainant and his witness and the evidence of the lack of a record of the seizure in the relevant diaries. In the circumstances, I find the case proved beyond a reasonable doubt, and I find the defendant guilty of the charge."

[97] Counsel's complaint in respect of this ground is succinctly stated in his written submission at para. 40 as follows:

> "The highest one could take that is that here was a failure to comply with internal police procedure. That as a fact, cannot be used to conclude that the appellant was part of a joint enterprise under the Corruption Prevention Act. The findings of the Learned Parish Judge under this heading is flawed and cannot stand."

Submissions by the Crown

[98] Ms Edwards argued that the entire comment of the learned judge must be read as a whole and not taken apart. She noted that the learned judge did not single out the fact that there was no record of the seizure as the only reason for arriving at the conclusion that the appellant was guilty. She submitted that the statement of the learned judge, correctly interpreted, is that, even without the video recording, the Crown had presented sufficient evidence to prove the guilt of the appellant.

Analysis

[99] We agree with the submissions of the Crown on this ground of appeal, and we find that Mr Wildman has overly simplified the conclusion which can reasonably be drawn from the words of the learned judge about which he complains. The failure to record the seizure of the car was in our view powerful evidence supportive of the Crown's case and which was consistent with the accounts of Messrs Cambers and Graham that the appellant solicited money for the return of the car. The evidence of Supt Rigabie was that the taking of the car to the compound of the police station after seizure should have been recorded. Even if the appellant intended to return the car once the proper documents were furnished as he asserted in his unsworn statement, that is not a good explanation as to why it was not recorded in an appropriate register. Accordingly, the learned judge was entitled to consider this evidence and its weight in the overall case as presented by the prosecution. We understood the point that the learned judge was making to be that even if she disregarded the evidence of what transpired in the office of Supt Rigabie, the prosecution had still presented a case on which she would have been comfortable concluding that the appellant was guilty.

Conclusion

[100] We do not find the complaint in respect of the learned judge's approach to have any merit. We are of the opinion that her conclusion that what transpired prior to the meeting in Supt Rigabie's office, including the appellant's failure to record the seizure of the car was evidence of the appellant's guilt, cannot be faulted.

Application of the proviso in section 14(1) of the Judicature Appellate Jurisdiction Act ('JAJA')

[101] We have previously referred to the submission of Ms Edwards that the court should apply the proviso if it concludes that the learned trial judge ought to have given an express warning in relation to her treatment of the evidence of the statements made by Mr Mathie in the presence of the appellant and failed to do so. We also acknowledge the submission of Mr Wildman that this is not an appropriate case for the court to consider this option.

[102] We concluded that there is merit in ground c of the grounds of appeal which arises from the learned judge's finding of fact that money was collected by Mr Mathie (albeit returned). In our opinion, as the learned judge did not clearly demonstrate the legal basis for her conclusion in this regard, it could have been based on her acceptance of evidence that was in breach of the hearsay rule, including improperly admitted evidence of Mr Mathie's conduct in the absence of the appellant, which contained a prejudicial implied assertion. Consequently, although Ms Edward's arguments were raised specifically in relation to the statements of Mr Mathie in the presence of the appellant, we have also found merit in Mr Wildman's submission in respect of the evidence of Mr Graham relating to Mr Mathie's conduct.

[103] It is, therefore, arguable that our conclusion that there is merit in ground c could provide a possible basis for a successful appeal. This is because the learned judge used her finding of fact that Mr Mathie collected money in support of her ultimate conclusion that the appellant had solicited money.

[104] It is necessary to consider section 14(1) of the JAJA which provides:

> "14. – (1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
>
> Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

[105] This is not a case in which it can be successfully argued that if the evidence that Mr Mathie collected money is disregarded, the entire case against the appellant would collapse. The essential element of the offence for which the appellant was found guilty was that he "solicited" money. There is no requirement of the offence that the money must be actually received. We accept that evidence that Mr Mathie collected money on the instructions of the appellant would be powerful evidence supportive of the accounts given by Messrs Chambers and Graham. However, even without such support, the learned judge was entitled to assess the evidence of Messrs Chambers and Graham in respect of the act of solicitation by the appellant. We have earlier referred to the fact that the appellant's failure to record the seizure of the car in breach of police procedure was also evidence which was capable of supporting the account of Messrs Chambers and Graham.

[106] It is our opinion that even without a finding that Mr Mathie accepted money, the Crowns' case was a strong one and would still result in a finding of the guilt of the appellant. For this reason, we have arrived at the conclusion that no substantial miscarriage of justice has occurred by the appellant's conviction, and that this is an appropriate case for the application of the proviso.

Order

[107] For the reasons stated herein, we make the following orders:

1. The appeal against conviction is dismissed.

2. The sentence of four months' imprisonment at hard labour, suspended for 12 months is affirmed.

3. The period of 12 months during which the sentence is suspended is reckoned to have commenced on 25 September 2017, the date the sentence was originally imposed.