[2013] JMCA Crim 52

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO 24/2012

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

SHADRACH MOMAH v R

Ms Jacqueline Cummings for the appellant

Mrs Tracey-Ann Johnson and Mrs Tracy-Ann Robinson for the Crown

26 June, 31 July and 1 November 2013

BROOKS JA

[1] Nigerian national, Mr Shadrach Ifeyani Momah, was convicted on indictment in the Resident Magistrate's Court for the Corporate Area on 13 December 2011 for the offences of obtaining money by false pretences and fraudulent conversion. He has appealed against the conviction and the sentences imposed, of two months imprisonment on each count. Mr Momah has already served the sentences, but he also contests the learned Resident Magistrate's recommendation that he be deported from the island.

The evidence

[2] The evidence adduced by the prosecution at the trial, before Her Honour Mrs Lorna Shelly-Williams, was that on 16 September 2011, Mr Paul Brown, a taxi driver, was in a fast food establishment in the Half-Way-Tree area in the parish of Saint Andrew, when he saw Mr Momah. He did not know him before but had heard him speaking in the restaurant and was attracted by his accent. He approached Mr Momah and engaged him in conversation. During that exchange, Mr Momah told Mr Brown, among other things, that his name was Dr Samuels, that he was a gynaecologist, that he and his twin brother operated a clinic in the United States of America, that he was doing missionary work in Jamaica and that he had contacts in the United States Embassy who could secure non-immigrant visas.

[3] According to Mr Brown, "Dr Samuels" agreed to assist him in getting a visa and they subsequently met for that purpose. Mr Brown, in pursuance of the exercise, gave "Dr Samuels" a visa application form, photographs of himself, copies of the relevant portions of his passport and $13,500.00.

[4] After they parted, Mr Brown said that "Dr Samuels" called him that night. The latter was "very excited and told [Mr Brown] that [Mr Brown's] family could accompany [Mr Brown] to the states". Based on that felicitous news, Mr Brown met with "Dr Samuels" again and handed over an application form for a visa for Mr Brown's wife, as well as a further $13,500.00. The two payments were made between 17 and 19 September 2011.

[5] Mr Brown testified that both payments were in cash but that he did not get a receipt for the money. He said:

> "That is when the problem started. We were together that day so I spoke to the accused I kept asking him for the receipt and he keep tell [sic] me he would give it to me later on." (Page 9 of the record)

[6] At some point, "Dr Samuels" had told Mr Brown that he had paid the money, said to be the application fee for the visas. Thereafter, however, Mr Brown tried in vain to make contact with "Dr Samuels", in order to get the receipt from him. All his subsequent telephone calls to "Dr Samuels'" number went to voice mail.

[7] The next development was that on 24 September 2011, Constable Yolene Walcott found Mr Momah in a hotel room in the parish of Saint Ann. The constable testified that in searching Mr Momah's bag, she found, among other things, a non-immigrant visa application form in the name of Paul Malcolm Brown. She denied Mr Momah's suggestion that $27,000.00 was in his bag at the time. Based on the discovery of the form, she said, the police made contact with Mr Brown and he made a complaint to Constable Walcott.

[8] The contact with Mr Brown led to Mr Momah being arrested and charged with the offences mentioned above. Mr Brown testified that he was not aware of Mr Momah's true identity until Mr Momah was charged by the police.

[9] At his trial, Mr Momah testified that he was a computer software engineer and that he operated a business place in Clock Tower Plaza in Half-Way-Tree. He admitted that he did initially tell Mr Brown that his name was Dr Samuels but that he later told him his correct name. Mr Momah said that he initially gave an incorrect name out of embarrassment because of some unsavoury allegations that the police had previously circulated about him.

[10] According to Mr Momah, he did not tell Mr Brown that he was a gynaecologist, he did not tell him that he operated a clinic in San Francisco and he did not tell him that he had contacts to secure a visa. He testified that he operated an internet cafe' and that he assisted Mr Brown with two applications on the website for the United States Embassy.

[11] On Mr Momah's testimony, he transmitted the applications to the embassy and told Mr Brown to make the payments at the bank. He said that Mr Brown asked him to make the payment on his behalf and he agreed to do so. It was not an unusual arrangement, he said, as several customers used his services to submit their applications online. He agreed that he received the sum of $27,000.00 from Mr Brown along with the requisite documents. He said, however, that he received the money on 22 September 2011. On his testimony, it would have been a single payment and not two instalments of $13,500.00 each.

[12] Mr Momah testified that his last conversation with Mr Brown was on Friday 23 September 2011. On 24 September he was arrested by the police, they took him into

custody and took his bag with the documents and Mr Brown's $27,000.00. He said that he was a businessman with an established place of business at which he could be found and that he had no intention of running off with Mr Brown's money. He rejected all suggestions to the contrary. Based on his testimony, the reason that Mr Brown would not have been able to contact him, was that he was in police custody.

The findings

[13] The learned Resident Magistrate in a commendably comprehensive exposition of the reasons for her decision, set out the requirements of the law, identified the evidence proffered by each side, set out the issues of fact that were contested and those that were uncontested and then made her findings of fact. In those findings she accepted Mr Brown's evidence that Mr Momah told him:

a. that he was Dr Samuels, that he was a gynaecologist, and that he was doing missionary work in Jamaica;
b. that he had a twin brother with whom he operated a clinic in San Francisco in the United States of America;
c. that he had a friend at the United States Embassy and that based on that contact he was able to secure visas for Mr Brown and his family to travel to the USA; and
d. that he would not leave the island until Mr Brown had received his visa.

[14] The learned Resident Magistrate reviewed Mr Momah's evidence and rejected it as not being credible. She specifically rejected Mr Momah's testimony that he had eventually told Mr Brown his correct name.

[15] In concluding the matter, she found that the prosecution had proved its case to the requisite standard and, as a consequence found Mr Momah guilty on both counts of the indictment. It was after a subsequent hearing that the learned Resident Magistrate recommended that Mr Momah be deported. That hearing will be addressed in detail after the assessment of the grounds of appeal concerning the convictions and sentences.

The grounds of appeal

[16] Ms Cummings, on Mr Momah's behalf, and with the permission of the court, argued six grounds of appeal as follows:

> "1. There was insufficient evidence to prove the charge of fraudulent conversion.
>
> 2. The Learned Resident Magistrate erred when she inferred and/or held that there was evidence of conversion by the Appellant.
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> 3. There was no evidence that any false pretence was the reason why the complainant entrusted his visa application fee to the Appellant to pay at NCB on his behalf.
>
> 4. The Learned Resident Magistrate [sic] sentence of 2 months imprisonment at hard labour on each count to run consecutively was harsh as the counts arose out of the same facts and the Appellant should not have been sentenced to hard labour for that a duration.

5. The Learned Resident Magistrate erred when she commenced a hearing into the deportation of the Appellant as the said deportation hearing was a nullity.

6. The Recommendation for Deportation of the Appellant was manifestly excessive and harsh as additional punishment to his sentence and ought to be set aside."

The grounds of appeal against the convictions will be considered in the context of each of the counts.

Obtaining money by false pretences

[17] In respect of the count of obtaining money by false representations, the learned Resident Magistrate found that false statements, as she found them to be, were made in order to give Mr Brown "a false sense that [Mr Momah] was a man of probity" (page 41 of the record). She found that it was as a result of those representations that Mr Brown parted with his money. She then found that the representations were made with the intent to defraud.

[18] In addressing the issue of intent, the learned Resident Magistrate found that those false statements, mentioned above, were made as "part of a scheme to inspire trust and make capture difficult". She said, in part, at page 42 of the record:

> "I considered that the sums that were paid over to the Accused was [sic] to pay for the visas [sic] application and that the Accused asked [Mr Brown] if he wanted to pay the fees i.e. the $27,000 to the bank himself. I find that the request for [Mr Brown] to pay the sum to the bank was part of the overall scheme. However the question is whether [Mr Brown] would have parted with the sum to the Accused without the false name which was part of a scheme to

> inspire trust and make capture difficult. I find that the operating reason [Mr Brown] parted with the sum of $27,000 was due to the false pretence."

[19] Ms Cummings, in support of the ground of appeal concerning the count of obtaining money by false pretences, argued, that the offence had not been proved. Learned counsel submitted, in essence, that since an application for a visa requires the payment of a fee and since the payment to Mr Momah was a sum representing that fee, there was no false pretence.

[20] There was some overlap in her submissions on the counts for which Mr Momah was convicted, but the following excerpts from her written submissions demonstrate the gist of those arguments.

> "vi. There is also no evidence of any fraud. The Appellant did not receive the money for an unknown purpose by fraud. The Appellant asked the complainant to go and pay the visa application money himself at [the bank] but the [complainant] requested that the Appellant pay it for him. This is a legitimate expenditure that is required for any US visa application.
>
> vii. There was no trick used by the Appellant to get this money. It was for a legitimate purpose that the complainant would have had to pay whether he was being tricked or not."

[21] Learned counsel went on to argue that there was no evidence of a false pretence as Mr Momah did not represent anything about the facts to Mr Brown. According to her:

> "xxiii. ...It was true that the money was required to pay for [a] visa application fee.
>
> xxiv. It is true that the money must be paid at any [branch of the bank]. It is true that the Appellant can make the payment on [Mr Brown's] behalf. It is true that the passport or a copy thereof is required to take to [the bank] to pay the requisite fee."

[22] Ms Cummings also argued that proof of a falsely made promise is not sufficient to establish the offence.

[23] Learned counsel then addressed the finding of fact by the learned Resident Magistrate, that Mr Brown's asking the appellant to make the payment at the bank, was a part of a scheme to obtain money from Mr Brown by false pretences. Ms Cummings argued that the finding was unreasonable. She said that there was no evidence that Mr Momah's statements were for the purpose of obtaining money.

[24] The flaw in learned counsel's submissions in respect of the evidence required to establish the offence, is that she has failed to include the fact that, as found by the learned Resident Magistrate, Mr Momah made a long list of false representations of existing facts. They have been listed above and need not be repeated here. The fact that other representations, as set out by Ms Cummings, were true, does not nullify the effect of the untrue statements.

[25] The learned authors of Archbold, Pleading Evidence and Practice in Criminal Cases (36th Edition), in treating with the evidence required to establish the offence of obtaining money by false pretences, state, at paragraph 1943:

> "It is sufficient to show that the pretence was made, that the money, etc., was obtained thereby, with intent to defraud, and that the pretence was false to the knowledge of the prisoner: **R. v. Dutt**, 8 Cr. App. R. 51."

In **Dutt**, Lord Alverstone CJ, at pages 58-9 of the report, said that the important factor in respect of this offence is the knowledge of the person making the pretences.

[26] The learned authors of Archbold also point out that a false statement coupled with a promise is sufficient to establish this offence. They state at paragraph 1949:

> "Where the statement consists partly of a fraudulent misrepresentation of an existing fact and partly of a promise to do something *in futuro* ...this is a sufficient false pretence within the Act: **R. v. West**, Dears. & B. 575."

[27] In applying that principle to the instant case, it is apparent that the learned Resident Magistrate found that there was a fraudulent misrepresentation of an existing fact, and a promise to do something in the future. She found that Mr Momah had falsely represented, among other things, who he was, to whom he was connected, and that his connections could secure a visa for Mr Brown. She then found that he promised that he would pay over the application fee to the bank for Mr Brown. That was a promise, she impliedly found, that Mr Momah did not intend to keep.

[28] It was also open to the learned Resident Magistrate to find, after considering the list of false representations made by Mr Momah, that they were calculated to dupe Mr Brown into putting trust in him and paying over money to him. There is no basis for disturbing her finding in that regard.

[29] On that reasoning, there is no merit in Ms Cummings' submissions on this count.

Fraudulent conversion

[30] With respect to the count of fraudulent conversion, the learned Resident Magistrate found that the money was paid to Mr Momah a week before he was arrested. She accepted that, although he had not paid the money to the bank, Mr Momah had told Mr Brown that he had made the payment and that he was in possession of the receipt therefor. On the question of whether the lapse of time between the date of payment and the date of arrest was sufficient to support the count of fraudulent conversion, the learned Resident Magistrate said, at pages 44-45 of the record:

> "[Mr Brown] had stated that he was prepared to give the Accused more time to give him the receipt. This is important as it could be viewed that enough time had not passed as yet to consider that the money had been converted. This however has to be considered in light of the reason [Mr Brown] was prepared to give the Accused extra time to present the receipt. The evidence of [Mr Brown] is that the Accused had indicated to him that he was returning to San Francisco for two weeks and for that reason he was willing to give the Accused extra time to give him the receipt."

She found that the requisite culpable intent could have been inferred from the circumstances.

[31] In arguing the grounds concerned with this offence, Ms Cummings submitted that there was no evidence of any conversion by Mr Momah. Learned counsel said, at paragraph five of her written submissions:

> "…The fact is [that] he was arrested a few days after [Mr Brown] paid him the money but before he paid the money to [the bank]. The money [was] given to him allegedly on the 17th or 19th and he was arrested [on] the 24th September 2011. This is not evidence of conversion. There is no evidence that he used the money during that time for another purpose or for his own benefit."

[32] Mrs Johnson, on behalf of the Crown, correctly pointed to the elements required for the prosecution to prove the offence of fraudulent conversion. In support of her submissions, she cited an extract from the judgment of Panton JA (as he then was) in **Sonia Jones v Regina** RMCA No 8/2001 (delivered 25 June 2001). At page 56 of the judgment the learned judge of appeal stated:

> "**Regina v. Marshall Nicholas Bryce** (1955) 40 Cr. App. R. 62 is solid authority for saying 'where the charge is one of fraudulent conversion, it is essential that three things should be proved…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' (page 63)."

[33] It is also to be noted that the learned Resident Magistrate, in guiding herself, referred to the relevant sections of the Larceny Act. She first referred to section 24, which establishes the offence of fraudulent conversion. She then referred to section 64(2), although the record erroneously mentions 65(2). Section 64(2) establishes the type of evidence that will ground the offence. The subsection states:

> "(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."

[34] There was evidence on which the learned Resident Magistrate could have concluded that the offence of fraudulent conversion had been established. Apart from those mentioned at the beginning of this section, the learned Resident Magistrate also considered the fact that Mr Brown testified that "he repeatedly tried to contact the Accused after the money was paid over to him" (page 44 of the record). As was mentioned before, those attempts were in vain. The learned Resident Magistrate correctly stated that "a court is entitled to take into consideration the fact that the Complainant was unable to contact the Accused as evidence of the conversion" (page 44 of the record). Her finding was in accord with that entitlement.

[35] Mrs Johnson is therefore correct in her submissions that all three elements identified in **Regina v Marshall Nicholas Bryce** were proved by the prosecution and there is no proper basis on which the verdict on this count may be disturbed. These grounds also fail.

Sentence

[36] Ms Cummings, in her written submissions, argued that the sentences imposed by the learned Resident Magistrate were harsh and excessive because they were ordered

to be served consecutively. This, learned counsel argued, was wrong, as the offences "arose out of the same fact and circumstances".

[37] The indorsement on the indictment supports the complaint that the sentences were ordered to be served consecutively. In her reasons for decision, however, the learned Resident Magistrate, in accordance with the established principle that where offences arise out of the same transaction the sentences should normally be ordered to be served concurrently (see **Regina v Walford Ferguson** SCCA No 158/1995 (delivered 26 March 1999)), seemed to have intended to make an order for concurrent sentences. She said, at page 48 of the record:

> "The Accused is sentenced to two months for fraudulent conversion two months for Obtaining Money by means of False Pretence. Sentence [sic] to run **concurrently**." (Emphasis supplied)

[38] The learned Resident Magistrate, in passing sentence, considered that Mr Momah had, by the time he came to be sentenced, been in custody for over seven months. She also considered that he had a previous conviction for an offence involving dishonesty, and that that offence had been committed less than two years before the commission of those involving Mr Brown. Considering that Mr Momah, by virtue of the restriction placed on Resident Magistrates in imposing sentences, was liable to be sentenced to three years imprisonment for each of these offences (see section 268(2) of the Judicature (Resident Magistrates) Act), it cannot be properly said that two months imprisonment in respect of each offence was excessive.

[39] On the question of the imposition of consecutive sentences, it is accepted that the learned Resident Magistrate departed from the established practice of imposing concurrent sentences in these circumstances. In deciding whether she was wrong in so doing, it is necessary to examine the totality of the sentence imposed. In **Regina v Delroy Scott** (1989) 26 JLR 409, Carey P (Ag) said at page 410E:

> "The court is concerned to ensure that whatever sentence or sentences are imposed, **viewed globally**, the punishment should not be manifestly excessive." (Emphasis supplied)

[40] The concept of viewing the sentence globally is referred to elsewhere as the 'totality principle' (see **Kirk Mitchell v R** [2011] JMCA Crim 1 at paragraph 46). Under the 'totality principle', the aggregate of the sentences should not substantially exceed the normal level of sentences for the most serious of the offences involved. It cannot be properly said, bearing in mind the factors outlined above, that a sentence of four months for Mr Momah's offences was manifestly excessive. This ground likewise fails.

The recommendation for deportation

[41] Having convicted Mr Momah on both counts of the indictment, the learned Resident Magistrate, on 18 January 2012, proceeded to hear an application for his deportation. At the completion of the evidence in that regard, it is apparent that it was brought to the learned Resident Magistrate's attention that the application had been made without the authority of the Director of Public Prosecutions. That authority is required by section 17 of the Deportation (Commonwealth Citizens) Act (hereafter referred to as "the Act").

[42] The record shows that after written submissions were made at the end of the case for Mr Momah, on the issue of the deportation, the next time the court was convened in the matter (27 March 2012), an application, this time with the blessing of the learned Director, was proffered. Counsel, then appearing for Mr Momah, protested that development. The submission, then, was that the learned Resident Magistrate was "*functus officio*", having already heard evidence and submissions in the matter. It was argued that the learned Resident Magistrate ought to have made a ruling on the application that was previously before her.

[43] The learned Resident Magistrate rejected the submissions. She found that the previous proceedings, having been embarked upon without the authority of the Director of Public Prosecutions, and the court, not having made a ruling in respect of the previous application, could not be considered *functus officio*. She ruled that the fresh application would be heard and Mr Momah would have an opportunity to contest the application.

[44] The application was heard. Mr Momah protested the proceedings on the basis that an application for judicial review was pending in the Supreme Court. There was, however, no stay of proceedings issued by that court and the learned Resident Magistrate, quite properly, proceeded with the hearing.

[45] Evidence led included the contents of Mr Momah's passport. It revealed that he was permitted to land in the island on 26 June 2006. He was allowed to "remain in

Jamaica no longer than 30th June 2009 and allowed to accept employment". The period of time granted and the permission to accept employment was, apparently, due to the fact that Mr Momah was, at some point after June 2006, married to a Jamaican. The permission to remain in the island was never renewed and Mr Momah did not rectify his immigration status.

[46] The learned Resident Magistrate, after considering the evidence, took into account, among other things, including the fact that Mr Momah had fathered two children in Jamaica. She however, considered that he was not a man of previous good character. After reviewing all the evidence, she made her recommendation for deportation.

[47] Ms Cummings not only criticised the decision by the learned Resident Magistrate to abandon the previous hearing and start afresh, but also complained that the hearing of the second application was a nullity because Mr Momah did not fall within the category of persons who would be subject to deportation under the Act. Learned counsel also submitted that the decision to recommend Mr Momah's deportation was harsh and manifestly excessive.

[48] In answer to those submissions Mrs Johnson argued that the first hearing before the learned Resident Magistrate was a nullity and did not prejudice the second hearing. Learned counsel also argued that Mr Momah did fall within the definition of an "immigrant Commonwealth citizen" as defined by section 2(3) of the Act and was therefore subject to be recommended for deportation.

[49] The issue of the initial hearing will first be addressed. Before assessing the submissions of counsel it would be of assistance to quote section 17 of the Act. It states:

> "17. No proceedings shall be instituted under this Act except by the Director of Public Prosecutions or with his **previous sanction in writing**." (Emphasis supplied)

[50] Mrs Johnson relied on the case of **R v Joscelyn Williams and others** (1958) 7 JLR 129 in support of her submissions. In **R v Joscelyn Williams and others**, a Resident Magistrate, before commencing to hear evidence, had failed to sign an order for an indictment to be proffered. The requirement for the order was instituted by statute and was a condition precedent for the commencement of a trial on indictment. The Resident Magistrate only signed the order after the failure had been brought to his attention. He, however, did so during the course of the trial. The accused were convicted, and, on appeal, the trial was deemed to be a nullity, as the order had not been made in compliance with the statute. The court said, at page 133:

> "In our opinion a Resident Magistrate acting under section 272 must comply strictly with the provisions of that section. **It is that section which gives him jurisdiction**, after such inquiry as may seem to him necessary, to make an order either for the trial of an accused person by indictment or the taking of a preliminary investigation in the charge preferred against him. **It is this order of the Resident Magistrate that empowers the Clerk of the Courts to act** under section 274 of the law and prefer his indictment...
>
> Finding as we do, we are of the opinion that the appeal must be allowed and that the proceedings relating to the order for trial, indictment and conviction be accordingly set aside and annulled. While we do not here order a new trial,

> **the proceedings being declared a nullity, it will be a matter for decision by the Clerk of the Courts whether he will now ask for an order on the information charging the appellants so that proceedings may be taken against them *de novo*** either under section 274 by way of indictment or by way of a preliminary investigation." (Emphasis supplied)

[51] Based on that reasoning, which is accepted to be an accurate statement of the law, it would be correct to state, as Mrs Johnson urges, that, in the absence of prior action by the Director of Public Prosecutions:

a. the first hearing of the application for deportation before the learned Resident Magistrate was a nullity;

b. the issues of *autrefois convict* and *autrefois aquit* did not arise; and,

c. the learned Resident Magistrate, not having rendered a decision on the evidence that had been previously placed before her, was not precluded from hearing the correctly commenced application.

On those bases Ms Cummings' submissions in respect of the first hearing must fail.

[52] In order to address Ms Cummings' submissions in respect of the re-started hearing, it is first necessary to assess the statutory context of the hearing. Section 3 of the Act authorises the Minister responsible for such matters to make an order for the deportation of an immigrant Commonwealth citizen. One of the bases upon which the

Minister may make the order is that a court, before whom the person was convicted, recommends deportation. The section states:

> "3. Subject to the provisions of this Act, the Minister may, if he thinks fit, **make a deportation order in respect of an immigrant Commonwealth citizen who does not belong to the Island** and who is-
>
> (a) a convicted person in respect of whom the court certifying to the Minister that he has been convicted **recommends that a deportation order should be made in his case**, either in addition to or in lieu of sentence; or
>
> (b) an undesirable person; or
>
> (c) a destitute person; or
>
> (d) a prohibited immigrant." (Emphasis supplied)

[53] In order to identify who qualifies as an "immigrant Commonwealth citizen", it is necessary to refer to subsections (2) and (3) of section 2 of the Act. They state:

> "(2) For the purposes of this Act a person shall be deemed to belong to the Island if he is a Commonwealth citizen and-
>
> (a) was born in the Island or of parents who at the time of his birth were domiciled in the Island; or
>
> (b) **has been ordinarily resident in the Island continuously for a period of seven years** or more and since the completion of such period of residence has not been ordinarily resident in any other Commonwealth country continuously for a period of seven years or more; or
>
> (c) became a citizen of Jamaica by registration or by naturalization; or

(d) is a dependant of a person to whom any of the foregoing paragraphs of this subsection applies.

(3) For the purposes of this Act a person **shall be deemed to be an immigrant Commonwealth citizen** if he is a Commonwealth citizen at the date of the service upon him of a notice under section 7 or, **in the case of a convicted person, the date upon which he is charged with the offence**, and has been resident in the Island for less than the following periods immediately before that date **and not otherwise**-

(a) in the case of a prohibited immigrant, a period of six months;

(b) **in the case of a convicted person or of an undesirable person, a period of two years**; and

(c) in the case of a destitute person, a period of one year:

Provided that in determining whether any person is an immigrant Commonwealth citizen, any period during which a deportation order, a restriction order, or a security order, made under this Act has been in force as respects that person shall not be taken into account."

[54] Subsection (3) seems to suggest that, a convicted person may only be deemed an immigrant Commonwealth citizen if that person has been resident in the island for less than two years before the date on which he was charged with the offence for which he was convicted. If the person has been resident in the island for a period of two years or more it would seem that that person may not be classified as an immigrant Commonwealth citizen. This is because the subsection uses the term "and not otherwise".

[55] Mrs Johnson argued that Mr Momah fell within the auspices of section 2(3). She stated, firstly, that, having landed in the island in June 2006, he did not belong to the island as stipulated by section 2(2) of the Act. This is because he had not been ordinarily resident in the island for a period of seven years before the date that he was charged with the offences or before the date that the recommendation for deportation was made. Secondly, although it was difficult to follow this submission, it is understood that learned counsel's argument was, because Mr Momah was a visitor up to 30 June 2009, that period should not be calculated for the purposes of section 2(3), and because he was not lawfully resident in the island after that date, the subsequent period should not be considered either.

[56] Mrs Johnson's submission, if it has been fairly expressed, does not bear scrutiny. It is accepted that Mr Momah, although a Commonwealth citizen, did not qualify as belonging to the island at the time that the recommendation for deportation was made. He, therefore, does not fall within the auspices of section 2(2) of the Act.

[57] It seems, however, that Mr Momah does not fall within the provisions of section 2(3) either. Firstly, section 2(3) does not delimit or restrict the term "resident" in any way. The term is not defined in the Act and the context in which it is used does not suggest that it means "legally resident". Secondly, he was resident in the island for over five years before he was charged for the offences for which he was convicted. Thirdly, even if he could be considered, by virtue of his being permitted to remain in the

island, as not being "resident" up to 30 June 2009, he was resident in the island, before he was charged, for over two years after 30 June.

[58] The term "resident" has been considered in a number of cases. In one of those cases, **Reid v The Commissioners of Inland Revenue** (1926) 10 TC 673; (1928) SC 589, the Lord President (Clyde) at pages 678-9 expressed an opinion as to the meaning of the term. He said:

> "...But, if it be taken, as I think **it must be taken, that the relation between a person and a place which is predicated by saying that a person "resides" there includes inter alia the element of time, duration, or permanence**, it must also be admitted that that element - essential and important as it is - is not the sole criterion. In the **Wemyss** case [**Wemyss v Wemyss Trustees** (1921 S.C. 30)], as here, one of the parties maintained that the element of time was so important as to dwarf all the others into insignificance; **but I think the Lord Advocate rightly contended that the facts of the relation between a person's life and the place in which part of it is spent may contain elements of quality, connected with the person's mode of life, and so on, which are equally relevant for consideration as the element of time, or the durability of the relation.**
>
> Take the case of a homeless tramp, who shelters to-night under a bridge, to-morrow in the greenwood and as the unwelcome occupant of a farm outhouse the night after. He wanders in this way all over the United Kingdom. But will anyone say he does not live in the United Kingdom? - and will anyone regard it as a misuse of language to say he resides in the United Kingdom? In his case there may be no relations with family or friends, no business ties, and none of the ordinary circumstances which create a link between the life of a British subject and the United Kingdom; but, even so, I do not think it could be disputed that he resides in the United Kingdom. (Emphasis supplied)

[59] It would seem, applying the principle highlighted in the extract above to the instant case, that Mr Momah, regardless of where he lived, and with whom, must be said to have been resident in the island for over two years before the date that he was charged with these offences. He cannot, therefore, be said to have been an immigrant Commonwealth citizen at that time. As a result, he could not have properly been the subject of a deportation order under section 3(a) of the Act. An application for a deportation recommendation ought not to have been made or granted. Ground five of the grounds of appeal should therefore succeed and the order for the recommendation must be set aside.

[60] Bearing in mind the decision in respect of ground five, it would be unnecessary, and perhaps unwise, since it deals with the exercise of a discretion by the learned Resident Magistrate, to decide ground of appeal six, dealing with whether the recommendation for deportation was "manifestly excessive and harsh".

Conditions of bail

[61] Mr Momah was granted bail pending the disposal of his appeal. He was required to report to a police station and a residential requirement and a stop order against his leaving the island, were imposed. In light of the result of the appeal, Mr Momah and his surety should be discharged from their respective recognizances and the restrictive orders vacated.

Conclusion

[62] In concluding this matter it must be said that there was ample evidence on which the learned Resident Magistrate could have found that Mr Momah had made false representations with intent to defraud Mr Brown and that he had obtained money by way of those representations. There was also sufficient evidence, having regard to the provisions of section 64(2) of the Larceny Act, that Mr Momah could be deemed to have fraudulently converted to his own use and benefit, the money that he had received from Mr Brown.

[63] In the circumstances, there is no reason to disagree with the findings that the learned Resident Magistrate used in support of the convictions, nor indeed, with the convictions themselves. There is, similarly, no proper basis for criticising the duration of the sentences imposed in respect of each count on the indictment. The convictions and sentences should not be disturbed.

[64] There was, however, no basis for the application for a recommendation for Mr Momah to be deported. He was not an immigrant Commonwealth citizen as defined by section 2(3) of the Deportation (Commonwealth citizens) Act. This is because he was resident in the island for in excess of two years before he was charged with the offences for which he was convicted. The application ought to have been refused and the learned Resident Magistrate erred in granting the application and making the recommendation.

[65] It has been brought to our attention that, subsequent to the recommendation having been made, the Minister had issued an order under the Immigrant Restriction (Commonwealth Citizens) Act that Mr Momah "is prohibited from landing in Jamaica". That order is outside the remit of this appeal, but it would be fair and transparent, given Mr Momah's link with the island (including the fact that he has two infant children born here), that the decision of this court be brought to the attention of the Minister.

[66] The decision of the court, therefore, is:

a. The appeal against conviction and sentence is dismissed.

b. The convictions and sentence of the learned Resident Magistrate are affirmed.

c. The appeal against deportation is allowed.

d. The recommendation for deportation made by the learned Resident Magistrate was wrongly made and is set aside.

e. The appellant and his surety are discharged from their respective recognizances.

f. The reporting requirements, residential restriction and stop orders made on 11 September 2012 are hereby vacated.