

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CRIMINAL APPEAL NO 3/2016

**BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA**

DEAN PALMER v R

Ernest Smith for the appellant

Mrs Suzette Whittingham-Maxwell for the Crown

5 April and 23 June 2017

P WILLIAMS JA

[1] On January 2016, Mr Dean Palmer, the appellant, was convicted in the Resident Magistrate's Court for the parish of Saint Elizabeth, now Parish Court for the parish, for a breach of section 14(1)(a) of the Corruption Prevention Act. On 23 March 2016, the learned judge sentenced Mr Palmer to 12 months' imprisonment at hard labour. He immediately indicated his intention to appeal this conviction and sentence and was offered bail pending the appeal.

[2] On 5 April 2017, this court heard the appeal and made the following orders:

- “1. Appeal allowed;
2. Conviction quashed and sentence set aside;
3. Judgment and verdict of acquittal entered.”

These are the reasons for that decision.

[3] This is yet another of those matters which commenced prior to the passage of the amendment to the Judicature (Resident Magistrates) Act in February 2016. By that amendment, there was a change in the name of the 'Resident Magistrate's Court' to 'Parish Court' and a substitution of 'Judge of the Parish Court' whenever there was a reference to 'Resident Magistrate' or 'Magistrate' in the Act. This court in seeking to avoid confusion in one case similar to this used the new terms where appropriate in the judgment of **Nerece Samuels v R** [2017] JMCA Crim 17 (see paragraph [3]). The approach used in that judgment will be adopted in this judgment.

The evidence at trial

[4] The appellant, who is a member of the Jamaica Constabulary Force, was serving at the Lacovia Police Station in 2012. The circumstances, which led to his arrest, charge and eventual conviction, did not commence in the usual manner with a complaint made against him by anyone. Instead, it commenced on 16 May 2012 when Inspector Leroy Harrison, the station supervisor at the Lacovia Police Station, in carrying out his responsibilities, checked the Condition of Bail Register. This register recorded the names of persons ordered to report to the station as a condition of their bail along with a record of the offences with which they were charged, the bail sum, the date the persons were required to attend court, their last court date and the name of

their surety. Once the person reported, the person would also sign the register and the officer to whom the person reported would also sign and would note the date and time of the report.

[5] Upon making his checks, Inspector Harrison observed what he described as "similarities" in the signature of one such person reporting on the condition of his bail and the person accepting the report. The person reporting was Allan Gardener and the person accepting the report was the appellant. Inspector Harrison observed further that on "every occasion there was consistency right thought [sic] the Condition of Bail Register since [sic] accused, Allan Gardener and same officer".

[6] Inspector Harrison made comparisons between the Condition of Bail Register and the duty forecast and observed that on three occasions when the appellant would have been on day off or on weekend, his signature appeared as recording Mr Gardener's attending and reporting at the station.

[7] The inspector made an entry in the station diary in the following terms:

"It is observed that on page 88 of the Condition of Bail Register Allen Gardener, of Burnt Savannah District who is charged with conspiracy and on one million dollars bail and to report to the Lacovia Police Station everyday as requested by the Court, has never reported to the location but his name has been signed even without the day's date. It is observed that on all occasion that he is required to report Cons D. Palmer has signed as the person he reported to. On 22.4.12 Cons Palmer was on day off and still sign the Condition of Bail Register. On the 5 & 6 of May Cons D Palmer was on weekend but sign the Condition of Bail Register. On the 10.5.12 Allen Gardener as recorded reported at 8:10 p.m. which is not a condition of his bail

requirement but Cons D. Palmer attached his signature. There are also additional discrepancies where the signature of Mr Gardener was written without any date. It must be mentioned that Allen Gardener is wanted on warrant hence the reason for his none appearance. This behaviour is totally unaccepted [sic] and a report will be prepared and submitted to SP St. Elizabeth with a view of disciplinary action."

[8] On 19 May 2012, the appellant executed the warrant to which Inspector Harrison referred on Mr Gardener. The warrant was ordered in Parish Court for the parish of Hanover and bore the number F 55/08, which suggested that it was issued in relation to a matter in that court from 2008. Inspector Harrison was unable to say when the warrant had in fact been issued or when it was delivered to the Lacovia Police Station for execution. The inspector however explained that all warrants that were received had to be recorded in the warrant register which was kept at a desk where persons were required to familiarise themselves with the names of the persons for whom warrants had been issued. He maintained that this warrant for Mr Gardener had been entered in the warrant register although he could not say when this was done.

[9] The page of the Condition of Bail Register, which was the cause of the concern for Inspector Harrison, was admitted into evidence, through him. The inspector then proceeded to point out the matters that he said he had observed. On 22 April 2012 when the appellant would have been on day-off, there was in fact no signature of either Mr Gardener or the appellant. On 5 May, the appellant's signature appeared next to where Mr Gardener signed. On 13 May, Mr Gardener's signature appeared but there

was none for any officer and on 26 May, the signature of Mr Gardener appeared alone. The inspector described these observations as 'not normal'.

[10] On 14 June 2012, Constable Stokley Fagan who was then stationed at the Anti-Corruption Branch ("ACB"), based in Kingston, was the investigator of this matter. He attended the Lacovia Police Station and interviewed Inspector Harrison. On 15 June, he contacted Sergeant Robert Barrett of Narcotics, Kingston, who was the arresting officer in a matter against Mr Gardener, in which the bail offer had been made.

[11] On 28 June 2012, Constable Fagan attended the Parish Court for the parish of Clarendon sitting in May Pen where he interviewed and recorded the statement of Mr Gardener. Constable Fagan said Mr Gardener "would have been our complainant" and "would have communicated certain information connecting the accused to a criminal offence that's a breach of the Corruption Prevention Act".

[12] Constable Fagan had been accompanied to court in May Pen by the team leader, Detective Sergeant Owen Grant, and a few other police personnel from the ACB. Constable Fagan first met Mr Gardener in the car park at the rear of the courthouse. He interviewed Mr Gardener under a shed in that courtyard and eventually recorded a statement from him there.

[13] Mr Gardener, who was in fact the first witness called in the case presented by the Crown at the trial, said he first became aware of this matter when the police in the courtyard at May Pen spoke to him. He said he was "draped up" by the police when

confronted by them in the yard. When asked by them if he knew the appellant, he said he told them he "didn't know who they were talking about". He also said he stated that he "never know de money ting dem talk about".

[14] Mr Gardener admitted that he had in fact been arrested and locked up on a "weed charge" in the May Pen court sometime in 2012. He, having been granted bail for \$1,000,000.00 with the condition that he report every day between 6:00am – 8:00pm to the Lacovia Police Station, attended that station on 21 April 2012 and a friend who had accompanied him to the station introduced him to the appellant.

[15] Mr Gardener testified that he had reported to the station as ordered where he reported only to the appellant. He explained that when he attended the station he would just write his name and then go home. He had no further conversations or dealings with the appellant other than what had taken place when he first went to the station on 21 April. He further explained that usually when he went to report, he would sign, after which the appellant would sign at the end.

[16] During this testimony from Mr Gardener, the prosecution made an application pursuant to section 15 of the Evidence Act for leave to treat him as a hostile witness. The prosecution submitted that there were inconsistencies, which arose on the statement given to the police by Mr Gardener, which contradicted his evidence. This application was resisted by the defence, firstly on the basis that the statement was signed by "Allen Gardener" and not "Allan Gardener" and then later it was submitted

that if the prosecution "wishes to explore inconsistencies [it] has to establish a more solid foundation".

[17] The prosecutor asked a few more questions of Mr Gardener and renewed the application. The judge was shown the statement and then made the following ruling:

"Application granted pursuant to section 15 of Evidence Act as prayed to treat witness as hostile."

[18] Mr Gardener went on to explain that he could not recall all of what he told the police. He however insisted that he "never make no agreement" with the appellant.

The following exchange then took place between the prosecutor and Mr Gardener:

"Question: Didn't you agree with the accused to pay \$3,000 to sign Condition of Bail Register for you?"

Answer: No.

Question: On a later date when you went back to the police station didn't you pay \$3,000 to the accused to sign bail register that you were reporting on condition of bail?"

Answer: I gave him a drink money, I don't pay him to sign.

Question: Did you pay the accused \$3,000?"

Answer: I didn't pay him at police station, one day I saw him and gave him \$3,000 and tell him to have a drink.

Question: Where on the road you saw him?"

Answer: Don't remember where in Santa Cruz I saw him. I am free to go into the police station and sign in the government book which is there.

Question: Didn't the accused called you and tell you to come to the police station when you got locked up?

Answer I always go to the police station to report because it's my duty.

Question: \$3,000 you gave to the accused was not given to him to buy a drink?

Answer: It can buy a drink but it can't do nothing.

Question: \$3,000 given to the accused based on an agreement made with the accused?

Answer: No.

Question: Agreement was made with the accused at Lacovia Police Station?

Answer: No.

Question: Agreement between you and the accused was that he would sign in Condition of Bail Register daily that you reported when in fact you did not report?

Answer: No, I always go to the police station.

Question: You said at police station you would sign in one slot Allan Gardener?

Answer: Yes.

Question: Then go home?

Answer: Yes.

Question: You didn't sign one slot but in a number of slots?

Answer: You sign the same place every day.

Question: Did you sign in one slot or in a number of slots going down the page?

Answer: I can't recall.

Question: Based on that agreement with the accused you signed several columns in that register book on some days?

Answer: No.

Question: Signed those columns with the understanding that the accused would fill in the book after you left?

Answer: I just sign and I don't know what they do after I leave, they sign the little book and give it to me and I move on.

Question: Agreed also that the accused would not execute the warrant on you?

Answer: I don't remember."

[19] The prosecutor invited Mr Gardener to identify the statement he had signed and when asked if there was anything wrong with it he replied, "I said I gave the man a drink money". The statement was admitted into evidence whereon the following exchange took place:

"Suggestion: In your statement to police you didn't say you gave the accused drink money. What was said is on a later date I paid Cons Palmer \$3,000 as was agreed upon at the station.

Answer: I didn't pay him any money.

Question: Your statement was as I have just read it?

Answer: I can't recall them thing deh.

(Witness shown statement)

Question: Did you see that in the statement you gave?

Answer: I don't recall.

Prosecution tenders 'on a later date... upon at

the station'

No objections."

[20] Under cross-examination, Mr Gardener explained that at the time he was approached at the courtyard at May Pen, he was not only draped up but was told by the officer that "they were going to lock [him] up so [he] kinda get coward". He explained further that he did not want to sign the statement but said "from a police and dem write supm [sic] you haffi accept it". He said he was still feeling "coward" when the police instructed him to sign the statement. Mr Gardener maintained that he did not pay the appellant any money to sign the bail register in his absence. He was not asked for his bail book, which was signed by the officer when he reported to the station. He was never charged for failing to report at the Lacovia Police Station.

[21] When Constable Fagan was cross-examined, he admitted that he had formed the belief that Mr Gardener had indeed breached his condition of bail. He said he had pointed this out to Mr Gardener while interviewing him under the shed in the courtyard. This was prior to recording his statement. Constable Fagan did not know whether Mr Gardener was ever placed before the court for breaching the bail condition, however, during the interview, he had told Mr Gardener that the court would have been advised of it. After recording the statement, Constable Fagan had proceeded to the court room there in May Pen that was dealing with the original matter involving Mr Gardener and requested of the clerk of courts that the presiding Judge be informed about the alleged breach. Constable Fagan said Mr Gardener was not coerced into giving the statement

that, admittedly, was not recorded in his own words in its entirety. He admitted being familiar with the procedure regarding bail books being kept by accused persons but he did not ask to see or examine Mr Gardener's bail book.

[22] Constable Fagan testified that on 6 July 2012 the appellant attended the ACB where a question and answer session was conducted. Constable Fagan was the scribe and Detective Sergeant Grant did the questioning. On 16 July, Detective Sergeant Grant requested a specimen of the appellant's handwriting from him for submission to the Questioned Document Department. The appellant voluntarily acceded to the request. He wrote certain words and signed his signature as requested. On that same day, Sergeant Grant took the specimen handwriting to the Questioned Document Department and handed it over to Detective Sergeant Andrea Thomas.

[23] On 19 July 2012, Detective Sergeant Grant returned to the Lacovia Police Station and requested from Sergeant Harrison certain station records as found in the station diary covering the period of the allegations, the Condition of Bail Register and the duty roster. Sergeant Grant subsequently handed over these records and books to Detective Sergeant Thomas for analysis. In July 2014, when Constable Fagan was contacting the witnesses to advise them of the trial date which had been set for 6 January 2015, he was unable to contact Detective Sergeant Thomas. He applied for Sergeant Dixon of the same unit to do over the handwriting analysis.

[24] Sergeant Dixon testified that on 7 July 2015 he received "a foolscap bearing known handwriting/signatures of Dean Palmer; one blue station diary containing known signature and handwriting of Dean Palmer on page number 106 numbered 1-7; one gray Condition of Bail Register bearing purported handwriting and signature of Dean Palmer". The instructions he received were that he analyse and compare the known handwriting and signature of Dean Palmer from the foolscap and the station diary, to determine if the author of these two documents was the author of the Condition of Bail Register.

[25] Sergeant Dixon conducted his observation and examination and concluded that the same author wrote the document in question, and the known handwriting and signature, and that the same person had written all the documents.

The case for the defence

[26] The appellant, in an unsworn statement from the dock, described himself as a senior constable with 13 years of service, having enlisted on 12 November 2001. He gave details of his various assignments leading up to his transfer to the Lacovia Police Station in 2011. He outlined his duties at this station before giving details of his contact with Allan Gardener.

[27] He met Mr Gardener when he had attended the Lacovia Police station to report in accordance with the conditions of his bail. The appellant stated further that he did not know Mr Gardener before. He recorded the requisite and relevant information in the Condition of Bail Register, after which he invited Mr Gardener to sign. After Mr

Gardener had left the station, the appellant said he updated Inspector Harrison of Mr Gardener's reporting.

[28] The appellant said that on each occasion whilst he was at the station, Mr Gardener would visit on this condition of bail, and he would record the necessary particulars after which Mr Gardener would sign before leaving. The appellant stated that he and Mr Gardener were never friends or companions. He never had any conversation outside of the station compound or otherwise with Mr Gardener in relation to any other matter. He "never accepted, coerced or had any verbal or non verbal arrangements with Mr Gardener except with his consistency in reporting on his condition of bail". He also never instructed or told Mr Gardener "to make any future endorsement or otherwise in the Condition of Bail Register at the Lacovia Police Station for any reason whatsoever".

[29] The appellant said he had a tumultuous relationship at times with his then commander, Sergeant Leroy Harrison, which was a result of his open expression of Sergeant Harrison's incompetence as a Sergeant of Police relating to police duties. He explained how, sometime in 2012, while inspecting the station diary, he saw the entry by Sergeant Harrison in relation to Mr Gardener's reporting on condition of bail. He noted that the entry spoke to the fact that the court in Hanover had ordered a bench warrant for Mr Gardener sometime in 2008. He made checks in the warrant register and did not see any entry there relating to the warrant. Later that same afternoon, the appellant said he spoke with Sergeant Harrison about the contents of the diary.

Sometime after that, Mr Gardener reported on his condition of bail and the appellant informed him of the warrant. Although Mr Gardener denied knowledge of the warrant, the appellant instructed him to wait and then spoke to Sergeant Harrison, demanding to see the warrant, which the Sergeant retrieved from a "strong pan" in his office.

[30] The appellant read the contents of the warrant to Mr Gardener and made the necessary endorsement on it as well as the necessary entry in the station diary. Upon execution of the warrant on Mr Gardener, the appellant placed him in custody where he remained for three days before the police transported him to the Hanover division for court. The appellant explained how Mr Gardener "subsequently became agitated at [him] during the period as [he] was to be blamed for the breach of his constitutional rights". The appellant said that it was due to his efforts that the subsequent transportation of Mr Gardener to the Hanover police division took place.

[31] The appellant said he found it "astonishing" that the initial report of Sergeant Harrison "was formulated less than (6) months prior to [his] confirmation as Corporal of Police, having previously passed the Jamaica Constabulary Force Promotion Examination". He also found it astonishing that he "was only charged hastily by the DPP [Director of Public Prosecutions] after [he] had made several written applications to the ACB in relation to the progress of the investigations into this matter". The appellant concluded his statement declaring, "the actions of members of the Anti-Corruption Branch where full proper investigations were not carried out have caused me

to be falsely charged and I am of the belief that through the impartiality of the justice system I will be exonerated".

The grounds of appeal

[32] There were two grounds of appeal filed on behalf of the appellant on 15 April 2016, which can be regarded as the usual holding grounds namely:

- "1) That the verdict is unreasonable having regard to the evidence;
- 2) That the sentence is excessive in the circumstances."

Ground one

[33] Mr Smith submitted that the critical issue is whether the appellant was given and accepted a "drink money" from Mr Gardener to falsify the Condition of Bail Register. Thus, Mr Smith attacked the evidence of Mr Gardener, which he argued was unreliable, inconsistent and lacking in credibility. He noted that Mr Gardener admitted to giving a statement in relation to having given the appellant money to buy a drink but insisted that he did not give the money as payment to sign the Condition of Bail Register as alleged.

[34] Mr Smith highlighted the circumstances under which Mr Gardener said he gave the statement and noted that Mr Gardener had expressed a wish to withdraw the statement as "he didn't wish to hurt anyone and he didn't know it would go so far". Mr Smith submitted that this created some doubt as to Mr Gardener being a witness of truth. Further, in his submissions, Mr Smith noted that the learned Judge of the Parish

Court correctly recognised that Mr Gardener's previous statement was not evidence upon which she could act. He pointed out that she later stated, "Mr Gardener adopted and confirmed in the witness box, the content of his statement which underpins the charge before the court". This she identified as being that Mr Gardener gave the appellant "drinks money".

[35] Counsel submitted that implicit in the wording of section 14(1)(a) of the Corruption Prevention Act, is a requirement that there must be the giving and accepting of an article or money or other benefit, being a gift, favour, promise or advantage, whether directly or indirectly, by a public servant in the performance of his public function. Counsel concluded that the evidence given by Mr Gardener was unreliable and could not be taken as credible, and there was therefore no evidence to say that the appellant was in breach of this section. Thus, Mr Smith urged that the verdict was against the weight of the evidence and was therefore unreasonable, insupportable and should therefore be set aside. He referred to **R v Joseph Lao** (1973) 12 JLR 1238; **R v Cooper** [1969] 1 All ER 63 and **Harry Daley v R** [2013] JMCA Crim 14.

[36] Mrs Whittingham-Maxwell, in her submissions on behalf of the Crown, agreed that the main issue in this case was one of credibility. She noted that the learned Judge of the Parish Court ought to be commended for the clarity and structured way with which the notes of evidence were presented. Counsel however, expressed concern with the manner in which the learned Judge of the Parish Court dealt with some of the issues raised in this matter.

[37] One such issue was where the learned Judge of the Parish Court noted in her reasons for decision that, "nowhere in his unsworn statement does the appellant deny accepting the money from Mr Gardener". Mrs Whittingham-Maxwell observed that this was seemingly slightly inaccurate as while the appellant did not state explicitly that he did not accept the \$3,000.00, he did say "he never accepted, coerced, never had verbal or non verbal arrangement with Mr Gardener". Mrs Whittingham-Maxwell submitted that since it was the \$3,000.00 that the appellant was accused of accepting, he would only have been referring to that, when he denied accepting anything from the appellant.

[38] Mrs Whittingham-Maxwell also expressed discomfort at the approach taken by the police in obtaining the statement from Mr Gardener. She submitted that the extent of the voluntariness of the statement was doubtful as it was taken by police officers, who approached the appellant at court, resulting in his being put in fear so as to make the statement.

[39] Counsel also questioned whether there was a true basis to treat the witness as hostile in circumstances where the investigating officer had agreed that the statement of the witness had not been recorded in his own words and the witness had said it was he who wrote the statement. Further, counsel questioned whether the court ought properly to have treated this witness as hostile in any event.

[40] One other matter noted of concern, was the finding that the appellant had falsified the record, thus causing Mr Gardener to evade the execution of a warrant from another court against the background that there was unchallenged evidence that it was in fact the appellant who ultimately executed the warrant. Further, there was also concern about the learned judge's finding that even if there was no agreement prior to the making of the false entries, the subsequent collecting of money as payment for the corrupt act was sufficient.

Discussion and analysis

[41] The learned Judge of the Parish Court is to be commended for the clear and structured way in which she set out the findings of fact on which she found the appellant guilty. Significantly, this started with an appreciation of what was required of her as formulated by this court in **Rafel Levy v Mendoza Nembhard** [2014] JMCA Civ 49, where McIntosh JA stated:

"It is well settled, however and now hardly needs reference to any authority that a Resident Magistrate is not obliged to set out *in extenso* all the findings upon which a decision is based but that it is sufficient if the reasons disclose that the magistrate must have had in mind the relevant principles applicable to the matter at hand."

[41] In the instant case, the appellant was charged for a breach of section 14(1)(a) of the Corruption Prevention Act which provides:

"14 (1) a public servant commits an act of corruption if he -

- (a) corruptly solicits or accepts, whether directly or indirectly, any article or money or other

benefit, being a gift, favour, promise or advantage for himself or another person for doing any act or omitting to do any act in performance of his public functions."

[42] In **Dewayne Williams v R** [2011] JMCA 17, this court was concerned with the interpretation of this provision. Phillips JA conducted a useful analysis which commenced with a review of various authorities which had dealt with similar provisions, namely, **Jagdeo Singh v The State** (2005) 68 WIR 424 and **R v Smith** [1960] 2 QB 423; [1960] 1 All ER 256. At paragraphs [40]-[41], she stated:

"[40] On a review of the above authorities and on an examination of the specific section of the Act, it is clear that the words connote an offence once a public servant purposely does an act which the law forbids such as directly or indirectly requesting money or a benefit such as a promise for himself or another to do or refrain from doing any act in the performance of his public functions. In our view, the offence is made out, and the act of corruption occurs if the public servant only solicits the article, etc., for himself and to his advantage, to do some act in connection with the performance of his public functions, which in this case was the prosecution of the traffic offence.

[41] What can also be gleaned from the authorities is that the offence is committed once the apparent purpose of the transaction was to affect the conduct of the complainant corruptly. In keeping with the wording of our statute the 'person' must be a public servant. It matters not whether the complainant was fully aware of the intention of the appellant or whether the appellant intended to conclude the corrupt transaction."

[43] In the instant case, the particulars of the offence charged read as follows:

"...Being a public servant to wit a member of the Jamaica Constabulary Force between April and May 2012 in the parish of St. Elizabeth did corruptly accept directly the sum of three thousand dollars (\$3,000.00) as a gift for yourself for doing an act to wit to record Mr Allen Gardener {sic}...reporting on his condition of Bail at the Lacovia Police Station in the Condition of Bail Register in accordance with the order by the court to report everyday between 6am and 8pm as a condition of his bail so that the warrant would not be executed on him in the performance of his public function."

[44] Thus for a successful prosecution there had to be evidence, to the requisite standard, that the appellant was a public servant, who accepted the sum \$3000.00 as a gift for doing some act, namely, recording Mr Gardener's name in the bail register, indicating that he was reporting as ordered to do, so that a warrant would not be executed on him. In effect, the prosecution was required to prove that the appellant had accepted the money, which the complainant gave to him for a particular corrupt purpose of which both he and the complainant were aware.

[45] The problem that confronted the prosecution from early in the presentation of its case was that Mr Gardener, as the complainant, while asserting that he had given the appellant the money, categorically denied that he had done so for the corrupt purpose that the prosecution had alleged it was. Mr Gardener insisted that he had visited and reported to the station as required and had signed as requested in proof of his reporting. He also insisted that he had no arrangement with the appellant.

[46] The answers Mr Gardener gave to the questions asked of him prior to the application for him to be treated as hostile, can be assumed as being inconsistent with

what had been contained in his statement. He, however, thereafter continued to maintain that he had no agreement with the appellant and that he had given the money to the appellant so that he might buy a drink.

[47] The learned Judge of the Parish Court, having viewed the statement before acceding to the request, was aware of the inconsistencies and she dealt with his being treated as hostile in the following terms:

"Permission was granted by the court for the prosecution to treat Allan/Allen Gardener as hostile. I warn myself of the dangers involved when a witness contradicts himself and direct myself to consider whether I can give any credence to such a witness. It is only if I can that I may then consider which parts of his evidence I can accept. The previous statement is not evidence upon which I can act [R v Maw [1994] Crim LR 841]."

[48] This court in **Kayvon McPherson v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 87/2004, judgment delivered 7 April 2006, gave guidance as to how and when a witness should be treated as hostile. Cooke JA stated:

"8. In exercising their discretion whether or not accede to an application to treat a particular witness as hostile, trial judges should be guided by the provisions of the common law. See **Alfred George Thompson** [1977] 64 Cr App. Rep 96 at p. 98. In **Takis Prefas and Daniel Pryce** [1988] 86 Cr. App. Rep 111 at p. 114 the court accepted Article 147 of Stephen's Digest on the Law of Evidence as setting out the common law rules. This article is now reproduced:-

Unfavourable and Hostile witnesses.

If a witness called by a party to prove a particular fact in issue or relevant to the issue fails to prove such fact or

proves an opposite fact the party calling him may contradict him by calling other evidence, and is not thereby precluded from relying on those parts of such witness's evidence as he does not contradict.

If a witness appears to be hostile to the party calling him, that is to say, not desirous of telling the truth to the court at the instance of the party calling him, the judge may in his discretion permit his examination by such party to be conducted in the manner of a cross-examination to the extent to which the judge considers necessary for purpose of doing justice.

Such a witness may by leave of the judge be cross-examined as to:(1) facts in issue or relevant or deemed to be relevant to the issue; (2) matters affecting his accuracy or veracity or credibility in the particular circumstances of case; and as to (3) whether he has made any former statement oral or written relative to the subject matter of the proceeding and inconsistent with his present testimony...

In the case of a witness who is treated as hostile, proof of former statement, oral or written, made by him inconsistent with his present testimony may by leave of the judge be given in accordance with Article 144 and 145.

Both these cases are from the English Court of Appeal. They reflect the proper approach to the determination as to whether or not a particular witness should be treated as hostile."

[49] In the instant case, it is clear that the learned Judge of the Parish Court was guided by the correct principles when she acceded to the application that Mr Gardener be treated as hostile. Her approach to his evidence after he had been so treated, demonstrated that she appreciated that his credibility had been impugned and that she recognised the need for caution in acting on his evidence. She, however, did not expressly state that she should give his evidence the weight she thought it deserved (see **R v Christopher Parkes** (1991) 28 JLR 47).

[50] The learned Judge of the Parish Court ultimately made the following finding in relation to Mr Gardener's evidence:

"Having heard the evidence of how the statement came into existence and the salient parts thereof I am satisfied that on being cross-examined on his statement to the police, Mr Gardener adopted and confirmed in the witness box, the content of his statement which underpins the charge before the court. The evidence, for the avoidance of doubt, was that he gave Mr Palmer "a drink money". According to the theory of the prosecution, this "drink money" is the same money accepted by Mr Palmer. This drink money is the money referred to in Exhibit 1 by Allan/Allen Gardener."

[51] The exhibit, to which the learned Judge of the Parish Court was referring, is that portion of Mr Gardener's statement which was admitted into evidence. The exchange that had led up to its admission has already been noted at paragraph [19] above. This exhibit was of course not evidence on which the learned Judge of the Parish Court could have relied as to its truth.

[52] After the learned Judge of the Parish Court reviewed the evidence presented and the unsworn statement of the appellant, she made findings, which include this reference to the evidence of Mr Gardener:

"M. Regarding the evidence of Allen/Allan Gardener that he saw Mr Palmer one day in Santa Cruz and gave the latter a "drinks" money of \$3,000. The defence asks the court to reject this portion of Allen/Allan Gardener's evidence as he is an unreliable witness. It is trite that a judge may accept a part and reject a part of a witness' evidence. The prosecution asks that this portion of his evidence be accepted as it demonstrates that there was a giving of \$3,000 by Mr Gardener and the accepting of the \$3,000 by Mr Palmer. I accept that this cash was paid over to Mr Palmer and accepted as such as an advantage for himself."

[53] There was no mention of the evidence of Mr Gardener that he had not arranged with the appellant and had not agreed to pay the appellant \$3,000.00 to sign the Condition of Bail Register for him. While the learned Judge of the Parish Court had appreciated that she could accept and reject different parts of the evidence of a witness, in the circumstances of this case, where that witness was treated as hostile, it was incumbent on the learned Judge of the Parish Court to demonstrate how she dealt with those aspects of the evidence which directly contradicted the prosecution's case.

[54] The position at the end of the virtual complainant's evidence, as accepted by the learned Judge of the Parish Court, was that he had given \$3,000.00 to the appellant as a "drink money". There was not even evidence as to when this had taken place. In

effect, the evidence was of the payment of the money with no evidence from the payee of it being in connection with the performance of the appellant's duties.

[55] The learned Judge of the Parish Court went on to make the following finding of fact:

"N. Nowhere in his unsworn statement does the appellant deny accepting the money from Mr Gardener."

It is clear that this finding played a significant part in the eventual finding of the guilt of the appellant.

[56] In his unsworn statement, the appellant had said the following:

"We were never friends or companions; I have never had any conversation outside of the station compound or otherwise with M. [sic] Gardener in relation to any other matter. I have never accepted, coerced, I have never had any verbal or non-verbal arrangement with Mr Gardener except with his consistency in reporting on his condition of bail."

[57] It is noted that nowhere in an otherwise comprehensive rehearsing of the appellant's unsworn statement does the learned Judge of the Parish Court mention this portion. Although it is true that he did not specifically refer to the \$3,000.00, the failure of the learned Judge of the Parish Court to demonstrate that she even considered this general denial made by the appellant raises the question as to whether the defence was properly and fairly assessed by her.

[58] The virtual complainant's evidence satisfied only one aspect of the charge against the appellant, namely the payment and acceptance of money. The learned Judge of the Parish Court was therefore faced with the somewhat unusual task of finding evidence to satisfy the other aspects from other sources. Certainly, what can be regarded as equally unusual, was that the police identified what was said to be the corrupt act even before there was any evidence of anything done by the complainant or the appellant in relation to the corrupt act.

[59] The evidence of Sergeant Harrison was that upon noticing what he considered as the irregularities in the Condition of Bail Register, he noted the following in the station diary:

"It must be mentioned that Allen Gardener is wanted on warrant hence the reasons for his non-appearance."

Hence, the sergeant had come to this conclusion without any evidence that Mr Gardener had not in fact reported. He also concluded that his non-appearance was to avoid the execution of the outstanding warrant.

[60] There was conflicting evidence before the learned Judge of the Parish Court as to whether Mr Gardener was aware of the warrant. Indeed, he had first denied knowledge of its existence, then had said he knew about the warrant from he was "locked up in May Pen". The learned Judge of the Parish Court failed to appreciate the significance of this evidence in relation to why the complainant would have found it

necessary to arrange with the appellant in order to evade the execution of the warrant. She then failed to demonstrate how she resolved the inconsistency.

[61] Sergeant Harrison was unable to say when the warrant had been issued, or when it had arrived at the Lacovia Police Station for execution. He agreed, while being cross-examined, that the information about the warrant ought to have been entered in the warrant register and it was by this means that the appellant would have been made aware of its existence. He said he had in fact so entered it although he agreed that he had omitted this detail from his statement. Further, he was not sure that he had brought the information in the warrant register to the attention of the investigating officer.

[62] In his unsworn statement, the appellant had stated he became aware of the existence of the warrant after he had read the entry of Inspector Harrison. The appellant said he made immediate checks of the warrant register and did not see any entry in that register relating to a warrant for Mr Gardener. This then became an important matter to be determined, if the prosecution was to prove that the corrupt act was related to this outstanding warrant.

[63] The investigating officer, Constable Fagan, was cross-examined about the warrant register and said that it had not formed a part of his initial investigations. He also testified that he only copied the entry from the warrant register when instructed to do so by the court, sometime in 2014. Although the witness looked at some document,

which he identified, as what he had copied from the warrant register, he had not signed the copy and this document was not admitted into evidence.

[64] There was therefore no evidence presented to the learned Judge of the Parish Court as to when the warrant Mr Gardener was trying to avoid came to the Lacovia Police Station. More importantly, there was no evidence as to when the information about the warrant had been entered in the warrant register; hence, there was no evidence as to when it could have come to the knowledge of the appellant such that he would be party to an arrangement with Mr Gardener to evade its execution. The unchallenged evidence is that the appellant eventually executed the warrant on Mr Gardener and took him into custody. Thus, the important plank of the charge against the appellant establishing the reason he would have agreed to record that Mr Gardener was reporting, when he had not in fact been doing so, had not been established. The learned Judge of the Parish Court failed to demonstrate that she recognised this lacuna and to resolve it in any way.

[65] The learned Judge of the Parish Court demonstrated the basis on which she found the appellant guilty in the following findings:

"J. The Crux of the prosecution's case is that irregularities appeared in the Condition of Bail Register, these were identified by Inspector Harrison as similarities between the handwriting of Mr Gardener and that of Mr Palmer. It is for this reason that Inspector Harrison wrote Exhibit 2 and called the attention of the Superintendent to the matter.

- K. These irregularities became the subject of an investigation by MOCA and the relevant records were sent for handwriting analysis.
- L. The defendant does not dispute that it is his handwriting which is in the Condition of Bail Register where the name Allen/Allan Gardener appears. These entries which purported to be written Mr Gardener [sic] have been written by Mr Palmer says the prosecution's handwriting analyst in his unchallenged evidence. Both sides agree on this.
- O. The defendant has represented by writing the name Allan/Allen Gardener in the Condition of Bail Register that Mr Gardener attended in person and reported to the Lacovia [sic] as required by the court.
- P. The defendant has falsified the record for the period under review by Inspector Harrison, viz, April to May 2012.
- Q. The defendant has in so doing caused Mr Gardener to evade the execution of a warrant from another court.
- R. That the only logical conclusion which can be drawn from these premises is that Mr Gardener gave Mr Palmer a "drink money" to falsify the Condition of Bail Register in respect of the court ordered bail so as to allow Mr Gardener to evade the court ordered warrant."

[66] The evidence of Mr Gardener was that he had signed the Condition of Bail Register. He insisted that he would sign his name 'Allan Gardener' and leave every time he reported. He said he reported every day as required. He even described what he did in the following terms:

"When I go report after I signed he signed at the end. He put a mark and I would sign. The book draw up with where you must sign and then they sign after."

[67] Indeed there were two possible scenarios put to Mr Gardener by the prosecution after permission was granted that he be treated as hostile. This exchange first took place:

“Question: Agreement between you and the accused was that he would sign in Condition Bail Register daily that you reported when in fact you did not report?”

Answer: No I always go to the police station.”

Later the following exchange took place:

“Question: Based on that agreement with the accused you signed several columns in that register book on some days?”

Answer: No.

Question: Signed those columns with the understanding that the accused would fill in the book after you left?”

Against this background, it needed to have been made clear whether the words ‘Allen Gardener’ had been written by the appellant in accordance with the first line of suggestions or by Mr Gardener himself in keeping with the second.

[68] Sergeant Dixon said that he had received two documents bearing the known handwriting and signature of the appellant and one containing the purported handwriting and signature of the appellant. He was required to analyse the known handwriting and signature to see if the author of the documents were the same. There

was no mention specifically of the signature of Allan Gardener that appeared on the document.

[69] Although the evidence was that the master pattern of the known handwriting, the line quality of the known handwriting and signature are consistent with that of the questioned handwriting and signature, the evidence stopped short of expressing any opinion specifically about the signature purporting to be that of Mr Gardener. Notably, the officer had indicated that he had examples to demonstrate his finding but he was not requested so to do. This demonstration would surely have put beyond any doubt, whether the opinion of the expert related to the signature appearing in the Condition of Bail Register for Mr Gardener.

[70] The learned Judge of the Parish Court, after reviewing the evidence of Sergeant Dixon, said:

"24....The evidence of Sergeant George Dixon, questioned document examiner was similarly unchallenged. His evidence established that the questioned signatures which appeared in the Condition of Bail Register as that of Allan/Allen Gardener for the period under review were actually in the handwriting of Mr Dean Palmer. That both of these witnesses, particularly Sgt. Dixon was [sic] not cross-examined is noteworthy. As Mr Palmer's position is inherently opposed in substance to the theory of the prosecution's case one would expect this would have been canvassed with the witnesses because a cross-examiner cannot rely on evidence that is contradictory to the testimony of a witness without first [sic] putting the evidence to the witness in order to allow them to justify the contradiction."

[71] This conclusion of the learned Judge of the Parish Court is not totally supported by the evidence. Sergeant Dixon was not invited to comment specifically on any questioned signatures, which appeared in the Condition of Bail Register as that of Mr Gardener. The defence may properly have formed the view that there was no need to challenge Sergeant Dixon since he had only referred to the known handwriting and signature of the appellant and the purported handwriting and signature of the appellant.

[72] The defence was not denying that the appellant had written in the Condition of Bail Register. Indeed, the appellant in his unsworn statement had said that on each occasion, whilst he was at the station, Mr Gardener would report and he would record the necessary particulars. He also said Mr Gardener would visit the station every day on condition of bail, sign and then would leave.

[73] It is noted that at no time was Mr Gardener invited to comment on the signatures purporting to be his. Constable Fagan admitted, under cross-examination, that when he was interviewing Mr Gardener, he did not show it to Mr Gardener but rather had "explained it". Constable Fagan did not however say what this explanation was. At the trial, Mr Gardener was not asked to support this important plank of the case that it was the appellant who had signed his name by commenting on the signature that appeared as his in the Condition of Bail Register.

[74] In conclusion, therefore, there was no credible evidence that the appellant had requested or agreed to accept the \$3,000.00 as a benefit or advantage to him. There

was no credible evidence that he had done so in connection with the performance of his public function. There was no credible evidence of any transaction, the purpose of which was to affect the conduct of the complainant corruptly. Given what we analysed of the available evidence, we were satisfied that the conviction could not stand. It is for this reason that we made the order set out at paragraph [2].