

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL 155/90

BEFORE: THE HON. MR. JUSTICE CAREY, P (AG)
THE HON. MR. JUSTICE FORTE, J.A
THE HON. MR. JUSTICE GORDON, J.A (AG.)

R. v. ELLESTINE GRANT

Mr. M. Frankson for Applicant

Ms. C. Reid and Ms. Kathy Phipps for Crown

July 15 and 31, 1991

GORDON, J.A (AG.)

The applicant was convicted on 9th November, 1990 before Reid, J (AG.) and a jury on all three counts in an indictment which charged him with obtaining \$377,000 by false pretences in count one, and falsification of accounts in counts two and three. His application for leave to appeal refused by a single judge, was pursued before us and on the 15th instant was also refused. We promised then to record our reasons and in conforming with that promise these are they.

The applicant was the Operations Manager of the branch of the National Commercial Bank situate at Duke Street in Kingston. As such, he was in charge of, and had overall responsibility for the operations of the bank. In addition to "over the counter" transactions, the bank also conducted transactions on a facility called a telegraphic transfer. By this means one bank (the remitting bank) would authorise another to pay a named person a stated sum of money. The named person would attend the authorised bank with acceptable identification,

viz. a passport or driver's licence and the credit voucher from the remitting bank, and on the authorised bank being satisfied that the transaction was in order, the amount specified would be paid over to the named person. This was an established system. To facilitate this transaction the remitting bank would send a coded message to the authorised bank. Select competent officers would decode the message and prepare a debit voucher, called Inter Jamaica debit voucher. The decoded message would then be filed in a register called the Cable Register and the vouchers would be separately filed. As a further safeguard, the remitting bank would send a letter confirming the transaction and if for any reason confirmation was not speedily forthcoming, the authorised bank would request it.

The authorised bank would at the end of the day record in a Journal, the inter-bank transactions, and transmit them with the supporting vouchers to the Head Office where they would be checked and micro-filmed. The documents would then be returned to the branch the following day and there, they would be checked by the operations manager, appropriate notations made and they would be filed away. The transmission to and receipt from Head Office would be personally controlled by the operations manager who held the key to the despatch bag.

On the 5th May, 1966 the Harbour Street Branch of National Commercial Bank received an inter-bank telegraphic transfer from the Brown's Town branch authorising the payment of \$377,000 to one Junior Harvey. Mr. Harvey in due course came to the bank that day and produced his identification and sought payment. His credentials accepted, the officers, Mrs. Williams and Miss Greaves, who attended to him offered to pay him by cheque or part cash and part cheque in keeping with the system. He refused to consider any alternative to cash payment. His adamant posture was referred

to the applicant who responded "The man want cash, let him have it." He was accommodated. A transaction of this magnitude was remembered by the staff both for its size and the unusual manner of payment. The documentation to complete the transaction was to all intents and purposes completed.

On the 13th June, it was discovered that the transaction of the 5th was not genuine. There had been no requisition by the Brown's Town Branch to the Duke Street Branch for the payment of the sum of \$377,000. A check at the Duke Street Branch showed a page missing from the Cable Register. This page had contained the cable purportedly sent by the Brown's Town Branch on 5th May, 1988. Missing also from the records of the bank was the debit voucher of the transaction.

The Crown relied on circumstantial evidence and on the evidence contained in the deposition of Carlton Lawrence, a cousin of the applicant who left Jamaica after the preliminary examination. The evidence contained in the deposition told of a telephone conversation between the witness and the applicant followed by a visit to the witness in Hanover from the applicant who then bared a plot by which the witness would obtain a vast sum from the bank. The details would be engineered by the applicant. The witness refused to co-operate but assisted in bringing Junior Harvey and the applicant together and he loaned Junior Harvey his motor car to enable him to travel from Hanover to Kingston on 5th May, 1988 to carry out the fraud. The plot involved a report being made to the police of the loss of Harvey's driver's licence. About two weeks after the 5th May, 1988, the applicant visited the witness at work at Tamarind Lodge, and in his presence and in the presence of Harvey the applicant said that the police were making enquiries into the missing money and instructed Harvey to say, if questioned, that he knew nothing

of the transaction and was not the person involved.

The applicant in an unsworn statement denied involvement in any plot to defraud the bank. He said he was on bail prior to trial and he went abroad and returned to answer the charges. He offered to assist in the investigations into the fraudulent transactions. He had been an employee of the bank for seventeen years and had risen through the ranks.

Mr. Frankson for the applicant submitted that the learned trial judge ought not to have allowed the deposition of Carlton Lawrence to be adduced in evidence. He crystallised the grounds of appeal filed on two basic points:-

- (a) The statutory requirements of section 34 of the Justices of the Peace Jurisdiction Act were not satisfied; alternatively
- (b) If the provisions of the section were satisfied the learned trial judge ought to have exercised his discretion to exclude the admission in evidence of the deposition of Lawrence on the basis that it was manifestly prejudicial to the applicant's case and the prejudicial effect outweighed the probative value."

Section 34 of the Justices of the Peace Jurisdiction Act provides:-

"In all cases where any person shall appear or be brought before any Justice or Justices charged with any indictable offence committed within this Island, or whether such person appear voluntarily upon summons, or have been apprehended with or without warrant, or be in custody for the same, or any other offence, such Justice or Justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person who shall be at liberty to put questions to any witness produced against him, take the statement (according to Form (19) in the Schedule) on oath or affirmation of those who shall know the facts and circumstances of the

case, and shall put the same into writing; and such depositions shall be read over to, and signed respectively by, the witnesses who shall have been so examined, and shall be signed also by the Justice or Justices taking the same; and the Justice or Justices before whom any such witness shall appear to be examined as aforesaid shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such Justice or Justices shall have full power and authority to do; and if upon the trial of the person so accused as first aforesaid, it shall be proved by the oath or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, or is absent from this Island or is not of competent understanding to give evidence by reason of his being insane, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he, or his counsel or solicitor had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the Justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not, in fact signed by the Justice purporting to sign the same:

Provided, that no deposition of a person absent from the Island or insane shall be read in evidence under the powers of this section, save with the consent of the court before which the trial takes place."

The evidence led by the prosecution was that of Miss Grace Henry, the Clerk of the Courts at Sutton Street, at the time the witness deposed. She testified to the recording of the evidence by the Resident Magistrate and the involvement of counsel for the defence in the cross-examination of the witness. The other witness in this exercise was Hubert Lawrence, the brother of the witness Carlton Lawrence. He told of conveying his brother

from home to the Sangster International Airport. His brother he said had an airline ticket to go abroad. His brother left him and was processed at the airline counter. He then saw him go towards the section where immigration officers process passengers before they board their flights. He has not seen nor heard from the witness since.

The learned trial judge correctly held that this evidence satisfied the requirements of the act and we find no merit in this ground.

It was submitted on behalf of the applicant that although the learned trial judge ruled that the requirements of the act had been satisfied, he ought to have excluded it. Reliance was placed on R. v. Donald White 24 W.I.R page 305. This case was authority for the proposition that where the deposition of the absent witness was "the only evidence which sought to link the applicant with the crime, the trial judge ought not to" allow it to be put before the Jury. This case was decided in 1975. Since that date there have been a number of cases in which witnesses for the prosecution have either been killed or have left the island to reside abroad or have been scared away so that they fail to appear to testify. Having regard to the clear wording of section 34 of the Justices of the Peace Jurisdiction Act (supra) Donald White's case has been of doubtful authority and in R. v. Scott and Walters (1982) S.C.C.A 153-154/1980 Donald White was distinguished and has not since then been followed. Carberry, J.A., in a well reasoned judgment gave the historical development of the law and speaking for the court held that the trial judge had a discretion to admit the deposition of a witness in these cases, in evidence. At page 55 of the judgment in dealing with section 34 of the Justices of the Peace Jurisdiction Act Carberry, J.A., said:-

"The section in our Judgment makes the depositions of witnesses who have died or are too ill to travel to court admissible without the consent of the judge, whereas his consent is needed when it is a case of the witness being absent from the island, or affected by insanity. In the former case the Crown need only tender the deposition, and the onus of successfully appealing to the judge to exercise his residual discretion to exclude it, lies on the accused and his counsel. It is for the defence to establish the facts or factors that make it unfair for that evidence to be admitted, and to persuade the judge to exclude it. On the other hand, in the two latter cases it will be for the prosecution under the statute to secure the judge's consent to the admission of the deposition, and there will be therefore an onus on them to secure that consent. The application of the residual discretion of the trial judge will apply to all cases, but there will be important differences in the onus of proof and in its application depending upon which particular cause for admitting the deposition is being advanced."

The learned trial judge had a discretion to admit or exclude the deposition evidence. Having heard the evidence and submissions he exercised his discretion to admit it.

This court will only interfere with the exercise of the trial judge's discretion if it is shown that the discretion was wrongly exercised. We find that the learned trial judge's discretion was properly exercised.

The Crown's case did not depend entirely on the evidence contained in the deposition. There was evidence of other circumstances from which inferences could be drawn adverse to the applicant:-

- "(a) The applicant was responsible for despatch to Head Office of the vouchers, etc of telegraphic transfer transactions. he alone controlled the key to the container.

- (b) He received from head Office the container with the documents after they had been processed there.
- (c) He was required to, and did, in fact, check them off to see that the returns were in order.
- (d) He noted that Head Office indicated that the voucher supporting the transaction had not been received.
- (e) He did absolutely nothing about it. He did not seek to institute a search for it. He asked no one about it. He did not contact Brown's Town Branch for confirmation of the transaction. He was entirely inactive. It was his responsibility to see to the early resolution of the subject of the missing voucher but he failed to act.
- (f) Above all, he knew that large amounts were not paid in cash but by draft. Yet, when he was contacted by Mrs. Williams and Miss Greaves about the customer's insistence on receiving cash, he did not seek to observe the bank's policy and attempt to persuade Junior Harvey to accept a draft in payment. He promptly instructed the unheard of course "The man wants cash, give him cash."
- (g) He had access to the records of the bank and the absence of the page of the Cable Register and the Inter Jamaica debit voucher coupled with the manner in which he dealt with the returns from Head Office indicating that the voucher was missing support inferences adverse to him."

The learned trial judge cannot be faulted for admitting in evidence the deposition of the absent witness. In his charge to the jury he carefully and at some length pointed out the weaknesses inherent in the deposition evidence. He gave adequate directions on accomplice evidence and circumstantial

evidence.

We examined the record with care and listened with interest to the submissions of counsel for the applicant but we were not persuaded that there is merit in this application.