[2022] JMCA Crim 26

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE DUNBAR-GREEN JA

PARISH COURT CRIMINAL APPEAL NO 6/2018

MARK RODNEY v R

Walter Scott QC and Peter Champagnie QC for the appellant

Miss Maxine Jackson and Miss Natallie Malcom for the Crown

26, 28 October 2021 and 6 May 2022

DUNBAR-GREEN JA

Introduction

[1] Mr Mark Rodney, the appellant, was charged on several informations for breaches of the Corruption (Prevention) Act ('the CPA'). On 16 March 2016, he was convicted in the Resident Magistrate's Court for the Corporate Area (now the Kingston and Saint Andrew Parish Court) and ordered to pay a fine of $800,000.00 or serve six months' imprisonment in default of payment on each information. The appellant paid the fines but has appealed against the convictions and sentences.

[2] We heard the appeal and agreed with counsel for the appellant that, at the close of the prosecution's case, there was insufficient evidence on which the appellant could be convicted. Accordingly, we made the following orders:

> "1. The appeal is allowed.
>
> 2. The convictions are quashed and the sentences are set aside.

3. A judgment and verdict of acquittal is entered on each of the informations."

[3] We promised to put our reasons in writing and now do so.

The factual background

[4] Between July 2008 and January 2012, the appellant was employed at the National Solid Waste Management Authority ('NSWMA'), an agency of the Government of Jamaica, which, among its responsibilities, maintains public parks and green areas as well as executes special projects for public and private entities. The NSWMA would sometimes execute projects by engaging sub-contractors. It was a series of these sub-contracted works which led to the appellant being charged.

[5] In January 2008, about six months before he began working at the NSWMA, the appellant incorporated a company, General Maintenance and Construction Services Limited ('GM&CSL'). He removed his name as a director but remained a shareholder in October 2008. That company successfully bid for contracts from NSWMA between June and December 2010. The contracts were executed and the requisite payments made. The problem was that the bids from GM&CSL were received and approved by NSWMA at a time when the appellant was its manager of parks and special projects, with responsibility for overseeing such projects.

[6] Consequently, the appellant was charged for use of his public office to obtain an illicit benefit and the improper use of confidential information for his own benefit. The particulars of those charges are as follows.

<u>The charges</u>

[i] Obtaining an illicit benefit

> "[The appellant], former manager of the Parks and Garden Division of the [NSWMA] on 31 December 2010, in the parish of St. Andrew in the performance of his public function did an act for the purpose of obtaining an illicit benefit - J$624,300.00 for himself to wit he granted to his [c]ompany

> General Maintenance and Construction Services LTD the award of contracts and personally benefitted for [sic] work purportedly done by his company [c]ontrary to section 14(1) (b) of the Corruption Prevention Act." (Information 14009/13)

[ii] Improper use of confidential information

> "[The appellant] [b]eing a public servant did improperly use confidential information he obtained in the course of the performance of his functions-to wit his knowledge of the procurement of goods and services at the National Solid Waste Management Authority for his own benefit [in amounts of $624,300.00; $2685,000.00; $924,000.00; $2,422,500.0; $2930,775.00; $3,209,000.00] [c]ontrary to [s]section 14 (6) (a) of the Corruption Prevention Act." (Informations 17124/14, 17125/14, 17126/14, 17127/14, 17128/14 and 17129/14)

Unsatisfactory record

[7] We are constrained to make the observation that the record of proceedings was woefully deficient and generally unacceptable. No original informations were produced; only incomplete copies were furnished by the Office of the Director of Public Prosecutions ('ODPP') to supplement the record of proceedings from the Parish Court. The information numbers on the copy informations were inconsistent with the numbers indicated in the notes of evidence as well as in amended notes which were attached to a letter from the judge of the Parish Court ('the learned judge'), dated 19 October 2021. Nonetheless, we reluctantly decided to use the information numbers in the amended notes of evidence and the charges as set out in the incomplete copy informations, throughout this decision. Among the other serious deficiencies in the record was the absence of parts of the notes of evidence including the no-case submission, reply and ruling, and some exhibits. We will return to these matters later.

The prosecution's case

[8] The notes of evidence indicate that the prosecution relied on 11 witnesses including Colonel Allan Douglas whose witness statement was admitted into evidence. That statement, although absent from the original record of proceedings, was later

exhibited in a supplemental affidavit, filed by the appellant. The salient aspects of the evidence are summarised below.

Witnesses from the NSWMA

Monica Young

[9] Ms Monica Young worked at the NSWMA as a human resource officer. She gave evidence that the appellant was first employed at the NSWMA as an executive assistant to the executive director. He subsequently became the manager for parks and special projects until the termination of his contract in January 2012.

Adrian Grant

[10] Mr Adrian Grant succeeded the appellant as manager of parks and gardens. His role included ensuring that the proper procurement guidelines were followed and confirmed after the procurement process was completed. He explained that where an external body engaged the services of the NSWMA, an assessment of the work was done by the business development office and discussed with the relevant project supervisor. If there was no objection, the manager of parks and gardens authorised the project to proceed. A team would then meet to "ratify decisions to do with procurements".

[11] The manager of parks and gardens could authorise a contract for work in the amount of $275,000.00 or less, after receiving three quotations, relevant tax registration numbers and valid government identifications. None of the contested contracts fell in this category. However, contracts exceeding $275,000.00 had to go to the procurement committee, which was chaired by the director of operations, or circulated for a decision by way of round robin, (i.e. an approval arrangement whereby the executive director would seek permission from the procurement committee, "through a memo", with attached documentation). The executive director had authority to sign off on contracts valued at up to $3,000,000.00 and could seek a procurement decision by round robin. Notwithstanding, both contracts authorised by the manager of parks and gardens and

those by the procurement committee had to receive final approval from the executive director.

[12] Mr Grant said he sat on the procurement committee in his capacity as manager of parks and gardens, albeit not as a permanent member.

[13] Contracts for work would go through a number of steps for approval. First, a standard form contract would be completed. This included the basis on which the contractor was identified. Second, a purchase order was prepared and a purchase requisition signed by the manager of parks and gardens. Third, a purchase requisition was sent to the procurement manager for verification that there was compliance with procurement guidelines. Fourth, the purchase requisition went to the budget and revenue manager who affixed a stamp if payment was provisioned. Fifth, the purchase order and purchase requisition were then sent to the executive director for final authorisation.

[14] Payment was made on the contractor's invoice after the supervisor verified that the work was completed satisfactorily. When contracts were approved, the accounting department prepared the cheque for payment.

[15] Mr Grant said that as manager of parks and gardens, he was not allowed to enter into contracts with NSWMA, to supply goods or services.

Michael Walters

[16] Mr Michael Walters was the NSWMA's director of finance. His evidence about the procurement procedure was broadly similar to Mr Grant's. He explained that purchase orders had to be signed by the executive director but the purchase requisition and the National Contracts Commission ('NCC') procurement form were signed by a manager or head of the relevant unit. He stated that he was not aware that an employee could be awarded a contract to supply goods and services to the NSWMA.

[17] Under cross-examination, Mr Walters said he had no recollection of seeing an invoice on which the appellant was the sole signatory. He also indicated that payment

would be made when the supporting documentation was in order and the purchase order bore the executive director's signature.

Colonel Allan Douglas

[18] Colonel Allan Douglas was the NSWMA's director of operations and chairman of the procurement committee, at the material time. In that capacity, he had written to regional managers and regional administrators "regarding the fact that employees of NSWMA were not permitted to do business with the NSWMA". He stated that the appellant was a consistent member of the procurement committee but said he was not aware that he had an interest in GM&CSL.

[19] Colonel Douglas, in his written statement, referred to two NSWA cheques and supporting documents which he said were shown to him by Detective Inspector Carey Lawes. Those cheques were drawn on the National Commercial Bank ('NCB') in favour of GM&CSL. The first, dated 23 August 2010 and numbered 1005249, was in the amount of $2,685,000.00. The other, dated 31 December 2010 and numbered 1007434, was in the amount of $624,300.00. He said the cheque numbered 1005249 was "justifiably prepared" as both the cheque and requisition bore his signature (as an authorised signing officer) and that of the executive director. The purchase order for the second cheque had also been signed by him on the executive director's behalf. None of the referenced documents were put into evidence through this witness.

Technical witnesses

Cecil Harrison

[20] Mr Cecil Harrison, an assistant forensic examiner at Financial Investigation Division ('FID'), testified that he was a part of the team that conducted investigations at NSWMA and its subsidiaries. He had come into possession of various documents including vouchers, invoices, requisitions, round robin forms and negotiated cheques by the senior auditor at the NSMWA. His examination of those documents revealed that the NSWMA

was "involved with" GM&CSL and that the appellant was the owner and a director of GM&CSL while being employed to the NSWMA.

[21] As a part of the investigations he had inspected certain documents at the NCB in relation to GM&CSL. They included signature cards for accounts, certificates of compliance and copies of cheques (from NSWMA to GM&CSL) as well as cheques made out by GM&CSL to third parties. He said the documents were handed over to the investigating officers.

Deidre English Gosse

[22] Mrs Deidre English Gosse was the Registrar General Deputy and CEO of the Registrar General's Department. She gave evidence that, at the request of the Organized Crime Investigation Division, her office provided computer-generated certified copies of birth certificates of the appellant and three others. These were tendered and admitted into evidence.

Karen Young

[23] Ms Karen Young, branch manager of the NCB, gave evidence that the NSWMA had a current account numbered 101662314 at the Duke Street Branch of the NCB and that she had confirmed to the police that certain cheques were debited to NSWMA (with serial numbers 1006542, 1007434, and 1005249, respectively). The payees, amounts and customers' signature were also confirmed. The copy cheques and two remittance advice slips numbered 1004825 and 1004439 were respectively marked (KY7 to KY11) for identity. There was no evidence as to who the payees were or who negotiated the cheques. Neither was there any evidence that the documents marked for identity were admitted into evidence.

Dean Simpson

[24] Mr Dean Simpson gave evidence that, in March 2012, he was the branch manager at the Linstead Branch of the NCB. His evidence established that the appellant had presented the reference and authorisation forms to open an account in the name of

GM&CSL and he was a signatory on the account. Twelve documents (exhibits 4 to 15), pertaining to GM&CSL's account at the branch, were tendered and admitted into evidence through this witness. These documents included deposit slips, dated between May 2010 and January 2011, in the amounts of $21,533,500.00, $2,424,500.00, $2,712,500.00, $234,000.00, $2,677,500.00, $2,386,000.00, $542,707.00, $1,065,000.00, and $495,000.00. The deposit slips were signed by persons other than the appellant.

Latoya Thomas

[25] Ms Latoya Thomas, the manager of the National Motor Vehicle Registry at Tax Administration Jamaica, gave evidence pertaining to a 2000 Land Cruiser and a 2005 Land Cruiser which were registered in the appellant's name.

Tori-Ann Foster

[26] Ms Tori-Ann Foster, an attorney-at-law at the Land Title Division of the National Land Agency, gave evidence pertaining to two parcels of land which were registered in the name of the appellant, in April 2010 and December 2010. Two instruments of transfer and two copy titles were admitted in evidence, through her.

Police witness

Detective Sergeant Warren Fowler

[27] Detective Sergeant Fowler was assigned to the Counter-Terrorism and Organized Crime Branch ('C-TOC') in 2012. He was the investigating officer in this matter. He testified that he received certain instructions from Detective Inspector Lawes and as a result, contacted Mr Grant of NSWMA. During his investigation into transactions between GM&CSL and the NSWMA, he made enquiries at the Companies Office of Jamaica, the Duke Street and Linstead branches of the NCB, the National Motor Registry, the Registrar General's Department and the National Land Agency.

[28] He took the appellant into custody on 6 June 2012 and was present at the question and answer interview conducted by Detective Inspector Lawes.

[29] Detective Sergeant Fowler stated that, on 12 June 2012, he charged the appellant for a number of offences. He did not say what the offences were or the basis on which he had charged the appellant.

The defence

[30] Given our oral decision in favour of the appellant there will only be a brief outline of the defence.

The appellant's unsworn statement from the dock

[31] The appellant stated that he was not a member of the procurement department and did not have the authority to grant contracts to GM&CSL. His signature was not on the approval sheets completed by the procurement committee, the purchase orders or the cheque requisition vouchers. He had also written a memorandum, dated 9 September 2008, to the then director of operations and chairman of the procurement committee, identifying himself as a shareholder in GM&CSL and requesting that communications with GM&CSL be directed to Mr Derrick Williams. In support of his defence, he called the following two witnesses.

Joan Gordon Webley – Executive Director of the NSWMA (2007 – 2011)

[32] Mrs Gordon Webley testified to the appellant's employment and what she described as "the strict procedures for the procurement of goods and services at NSWMA". This involved many stages and several participants but the manager of parks and gardens would not be involved in the procurement process.

[33] She knew of the appellant's interest in GM&CSL and that he had indicated an intention to withdraw from the company on becoming employed to the NSWMA. Her understanding of the appellant's declaration of interest in GM&CSL was that he would not be able to participate in the procurement discussions involving that company. She had approved contracts by the NSWMA to the GM&CSL, by the round robin method, but maintained that the appellant was not allowed to participate. He would, however, inspect

the work carried out by the company after which another director and herself would do the final inspection.

[34] Eight documents were tendered and admitted into evidence through Mrs Gordon Webley. Exhibit 17 was the memorandum, dated 9 September 2008, from the appellant to the then chairman of the procurement committee, in relation to his intention to withdraw from the company. The round robin forms and accompanying documents for the cheque in the amount of $2,930,775.00 (in relation to information numbered 17128/14) were admitted into evidence as exhibits 18A to 18C. Mrs Gordon Webley said that she approved those documents and signed the purchase order.

[35] Exhibits 19A to 19C were in relation to a document numbered 97121/13. Mrs Gordon Webley testified that the document represented the "procurement Round Robin style". She said she signed the round robin form and the purchase order.

[36] Admitted into evidence also were: exhibits 20A to 20C - a procurement purchase order and requisition vouchers; exhibits 21A to 21C - a procurement purchase order and requisition voucher signed by designees; exhibits 22A to 22C- a procurement purchase order and requisition voucher; exhibit 23 which seemed to have had a round robin document appended, in relation to the amount of $2,685,000.00 (information17125/14); and exhibit 24 - a cheque signed by the executive director and Colonel Douglas. The latter two exhibits were not included in the record of proceedings.

[37] Mrs Gordon Webley noted that the appellant's signature was not on any of the approval documents and said that was because the appellant did not have the authority to sign. However, when confronted with exhibit 22 which carried the appellant's signature on a purchase order, she acknowledged his signature but expressed uncertainty about the purpose of it. She also stated that only "the executive director [could] enact [that] document".

[38] In relation to exhibit 23 (identified by a subsequent witness, Mr David Bloomfield, as a 'transmittal sheet') which carried the appellant's signature as authorising officer, Mrs

Gordon Webley stated that she could not say as a fact that the appellant was not part of the committee but that "he could not authorise a contract [as] he [was] not the executive director, [or] the chairman of the committee,..[or] a member of the round robin team". Additionally, "the chairman and the director sat in a meeting [in which the appellant was not a listed member] and authorised it and [she] approved it".

David Bloomfield - Manager of Administration Procurement and Documentation at NSWMA (2009 -2011)

[39] Mr Bloomfield gave an overview of the operations of the procurement process that was in place during his time at the NSWMA. He supported other evidence that, between 2009 and 2011, the appellant was the manager of parks and gardens and was therefore eligible to be a member of the procurement committee, though not in relation to any committee that granted contracts to GM&CSL. He was aware that the appellant had declared an interest in GM&CLS as, in 2008, the chairman of the procurement committee, who was also the director of operations, had brought the appellant's interest in GM&CLS to his attention. Subsequently, he ensured that the appellant was not a part of any procurement involving GM&CSL. He also stated that the appellant would not have been in a position to know what bid to make to secure a contract or who the competitors were although he would know when a contract was coming up for his department.

[40] Mr Bloomfield identified the document referred to as exhibit 23 as a transmittal sheet - which is written up after the contractor is selected. He said it did not surprise him that it bore the appellant's signature, as the manager of the relevant department would usually sign to indicate that he was aware of the procurement for his department.

The appeal

[41] The Crown had filed a preliminary objection to the appeal being heard on the basis that the supplemental grounds of appeal were not in accordance with section 296 (now section 299) of the Judicature (Parish Court) Act ('the Act'). However, that objection was abandoned at the start of this hearing.

[42] Counsel for the appellant, Mr Walter Scott QC, sought and obtained permission to abandon the original grounds of appeal and argue instead, the following supplemental grounds:

> "(a) The [learned judge] erred in law by refusing the Submission of No Case to Answer that was made by Counsel for the Appellant;
>
> (b) The [learned judge] erred in Finding that there is any sufficient evidence to establish a finding of guilt beyond a reasonable doubt in relation to Information Nos. 14009/13, 17124/[14], 17125/[14], 17127/[14], 17128/[14];
>
> (c) The [learned judge] failed to appreciate that General Maintenance and Construction Services Limited is a separate legal person from the Appellant, Mark Rodney and erred in finding that the Appellant 'did an act for the purpose of obtaining an illicit benefit for himself';"

[43] Grounds (a) and (b) of those grounds were argued together.

Whether the learned trial judge should have upheld the no-case submission and whether there was sufficient evidence to establish a finding of guilt beyond reasonable doubt (supplemental grounds (a) and(b))

Submissions on behalf of the appellant

[44] Mr Scott referred to and relied on the test for determining whether a *prima facie* case has been made out against an accused as set out in Lord Parker's **Practice Direction (Submission of No Case)** (1962) 1 WLR 227. A no-case submission should be upheld if either there is no evidence to prove an essential element of the offence charged, or where the prosecution's evidence has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

[45] Confining his submissions to the first limb of Lord Parker's Practice Direction, Queen's Counsel submitted that there was no evidence adduced by the Crown, at the close of the prosecution case, to satisfy the requirements of sections 14(1)(b) and

14(6)(a) of the CPA. He contended that the allegations had to be proved by witnesses and/or documents but the prosecution had failed in both respects as none of the four witnesses from the NSWMA gave any evidence in proof of the essential elements of the offences charged and that no relevant documents were adduced on the prosecution's case.

[46] In relation to the charge that the appellant obtained an illicit benefit in the sum of $674,300.00 (information -14009/2013), counsel submitted that the prosecution was unable to, and did not prove that: (a) the appellant had obtained an illicit benefit of $674,300.00; (b) the appellant granted to GM&CSL a contract in the amount of $674,300.00; or (c) the appellant personally benefitted from the $674,300.00. Instead, the evidence was that: GM&CSL was awarded a contract which was approved by round robin, in which the appellant did not participate; the work was carried out; and the sum of $674,000.00 was paid into the account of GM&CSL. He explained that the evidence in the documents (exhibits 18-23 inclusive) was that the contracts were approved by four persons, by way of round robin, and the appellant was not one of them; and the absence of evidence that the round robin approval was signed by the appellant, was sufficient proof that the appellant did not award himself the contract. He noted that all these documents were part of the case put forward by the defence.

[47] Moreover, although Mr Grant was called as a "systems witness" and had set out the system as he knew it, no documents were tendered in proof of it. Consequently, his evidence was clearly benign and innocuous. Similarly, with the evidence adduced by Detective Sergeant Fowler, no documents were tendered in proof of the allegations in any of the informations; and Colonel Douglas commented on documents purportedly shown to him by Detective Lawes but none of those documents were attached to his statement or tendered on the prosecution's case except the memorandum which he said was sent to the staff. And, in relation to that document, which was appended to his witness statement, there was no evidence that it had been sent to the appellant or was

forcefully brought to his attention. Again, all relevant documents were tendered through Mrs Joan Gordon Webley, a witness called by the defence.

[48] Queen's Counsel referred to the memorandum from the appellant to Mr McLean, in which he disclosed his interest in GM&CSL, and submitted that there was no subterfuge because in the said memorandum the appellant had made it clear that he was a shareholder in GM&CSL. He pointed out that the appellant had also requested that "all communications regarding contractual matters" between NSWMA and GM&CSL were to be directed to a Mr Derrick Williams who had assumed the position of managing director from 21 August 2008.

[49] In relation to informations numbered 17124/14 to 17129/14 (which dealt with the second offence), Mr Scott contended that the prosecution needed to prove that the appellant used confidential information for his own benefit, but had failed to adduce any probative evidence as to the confidential information that was improperly used. There was also no evidence that there was any particular information within the exclusive knowledge of the appellant that was improperly used.

[50] Consequently, there was no evidence elicited at the close of the trial on which either of the offences could be grounded. In short, the evidence had revealed that: (i) there were several mechanisms in place to ensure that no employee could grant himself a contract; (ii) the contracts to GM&CSL went through the proper tender processes and upon the evaluation and recommendation of the procurement committee which excluded the appellant; (iii) the executive director approved and awarded the said contracts; and (iv) the inspection of the work was not done solely by the appellant but also by other directors.

[51] Queen's Counsel concluded where he began, that at the close of the Crown's case there was no evidence to support either offence in the informations and there was a complete absence of any material probative of the essential elements of the offences charged in the informations.

Submissions on behalf of the Crown

[52] Senior Deputy Director of Public Prosecutions, Ms Maxine Jackson, appearing for the Crown, apologised for the unsatisfactory state of the record of proceedings and the notes of evidence. She indicated that neither her office, the ODPP, or the Clerk of Court was in a position to provide any information about the absence from the notes of evidence of counsel's submissions and the learned judge's ruling on the no-case submission. She also characterised the state of the record as "a very unsettling state of affairs" which was suggestive of a "lack of care in its preparation".

[53] In counsel's view, it was particularly "unsettling" that in her findings of fact the learned judge had referred to the evidence of one "Mr Audley McLean", when there was no indication in the notes of evidence that any such person had given evidence at the trial. Counsel referred to the letter of 19 October 2021, in which the learned judge sought to correct this error by indicating that the evidence attributed to Mr McLean was meant to be that of Mr Bloomfield. Counsel reasoned that it was, nevertheless, clear there had been another witness being referred to in this portion of the evidence other than Mr Bloomfield because both Messrs Mclean and Bloomfield were referred to separately in the notes of evidence.

[54] Counsel also pointed to other gaps, deficiencies, and inaccuracies in the evidence and/or the record, particularly: relevant documents identified by Ms Young and marked for identity were not admitted in evidence; there was duplication in the numbering of exhibits; the numbering sequence of exhibits was out of order; and several documents/exhibits were absent. She also recognised that Detective Sergeant Fowler's evidence did not state the offences for which he had charged the appellant.

[55] Our attention was also drawn to the absence of the original informations; incomplete copy informations; the absence of endorsements on the informations; and the incomplete list of exhibits. Counsel concluded, therefrom, that the state of the record was "not sufficiently comprehensive to deal with the appeal in a manner to enure to the benefit of everyone".

[56] We were referred to **Evon Jack v R** [2021] JMCA Crim 31 which, she said, exemplifies a correct analysis of the principles which should guide the court when the record of proceedings does not meet the test of reliability.

[57] If it were not already apparent, the quietus came when counsel for the Crown sought permission to withdraw the Crown's written submissions and, instead, made the oral submission that, given the unsettling state of the record and the absence of evidence from prosecution witnesses which could establish a nexus between the appellant and the charges, she had to agree with counsel for the appellant that the evidence was insufficient to make out the charges against the appellant. She explained that, although the Crown did not have sight of the learned judge's findings of fact, in relation to the no-case submission, the evidence starting at exhibit 3 was not sufficient to show the nexus between the appellant and the offences charged in the informations.

[58] In addressing the informations charging the appellant for the improper use of confidential information, Ms Jackson accepted that there was no evidence from the prosecution witnesses to support those charges. She also agreed with counsel for the appellant that the learned judge had placed heavy reliance on the evidence of Mr Bloomfield who was a witness called by the defence; that his evidence fell short in material respects; and that most of the evidence, generally, with the attached exhibits - relied on by the learned judge - actually came from witnesses for the defence.

Analysis

[59] Ground (b) of the grounds of appeal dealt with whether there was sufficient evidence to find the appellant guilty of the charges laid against him, beyond a reasonable doubt. It was not necessary to deal with that ground in light of our decision in relation to ground (a) which was about the sufficiency of evidence at the close of the prosecution's case.

[60] The narrow question considered by us was, whether at the close of the prosecution's case there was sufficient evidence adduced to make out a prima facie case

of guilt against the appellant on the charges. Both the appellant and the Crown said there was insufficient evidence to sustain the convictions and we agreed.

[61] At common law, the general rule is that the prosecution must establish the guilt of the defendant beyond a reasonable doubt (see case of **Woolmington v DPP** [1935] AC 462 at 481). Thus, when a defendant pleads 'not guilty', this casts a burden upon the prosecution of proving every fact that is in issue. Put another way, the prosecution must prove the whole of its case (see also **R v Sims** [1946] KB 531 at 539, per Lord Goddard CJ).

[62] The learned authors of the Halsbury's Laws of England Criminal Procedure (Volume 27 (2021), paras. 1–442; Volume 28 (2021), paras. 443–938) in their elaboration on the burden and standard of proof, said:

> "Where the evidential burden rests on the prosecution, the general rule is that it must be discharged by the end of the prosecution case. If it has not then been discharged (that is, if the prosecution has failed to adduce such credible evidence as would, if believed and uncontradicted, suffice to prove the case against the defendant) the defendant may successfully make a submission of 'no case to answer'."

[63] It was not in contention that a no-case submission was made at the end of the prosecution's case but was not upheld.

[64] Ideally, an assessment of whether a trial judge acted in accordance with the established legal framework, when considering a submission of no-case to answer, must necessarily involve, giving the reviewing court access to full and accurate notes of evidence and the record of the proceedings. We have already described the serious deficiencies in the evidence as well as the unsatisfactory collation of the exhibits, and will not repeat them. The upshot was an unacceptable violation of sections 291 and 292 of the Act which mandate how records in criminal cases are to be made and kept. Pursuant to section 292 of the Act, these records, with the seal of the court and signature of the clerk , "shall at all times be admitted in all Courts and places whatsoever as *prima facie*

evidence of such entries, and of the facts therein stated, and of the proceedings therein referred to, and of the regularity of such proceedings", (see also section 3 of the Court of Appeal Rules which, among other things, sets out special rules that govern criminal appeals to the Court of Appeal from the Parish Courts).

[65] As we observed in **Evon Jack v R** and **Sylvester Stewart v R** [2017] JMCA Crim 4, there is also likely to be a breach of the appellant's constitutional right to a fair hearing; to a copy of the record of the proceedings; and to have his conviction and sentence reviewed by a superior court (see sections 16(7) and 16(8) of the Constitution). This court, therefore, has to be vigilant in monitoring compliance with the aforementioned provisions as serious consequences can flow when there is non-conformity, not least of which is that the reviewing court may be hampered in carrying out a fair or any review of an appellant's conviction.

[66] Given the unsatisfactory state of the record of proceedings, in this case, we were not able to say, with any certainty, what were the contents of the informations laid against the appellant; what were the submissions in relation to the no-case submission; what were the contents of some of the exhibits; and what was the extent of the evidence that was led at trial. However, fortunately, there was no contention about the informations and counsel on both sides agreed that, although the notes of evidence were incomplete, they could be used to determine the narrow question of whether there was sufficient evidence at the close of the prosecution case, on which a finding of guilt could be made by a reasonable tribunal. Therefore, although inexcusable and egregious, the gaps in the record did not preclude a fair review of proceedings in the particular circumstances of this case.

[67] We turn next to deal with the question of how a trial judge should deal with a no-case submission at the end of the prosecution's case. Lord Lane CJ laid out the approach in **R v Galbraith** [1981] 2 All ER 1060,1062, when he said:

> "…If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge

> will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

[68] Lord Lane's statement of the law is consistent with Lord Parker's Practice Direction that a no-case submission may be upheld when the prosecution has failed to prove an essential element of the offence, or alternatively, the evidence adduced by the prosecution is so discredited, on cross-examination, or is so manifestly unreliable that it could not result in a safe conviction.

[69] From the evidence seen, there was clearly a basis for real concern as to whether the declared 'interest', by the appellant, in his memorandum to the director of operations, had been managed properly and consistent with the spirit of the provisions which govern the procurement of goods and services in the public service. That said, the learned judge was not called upon to adjudicate on good governance in the NSWMA. The simple question raised by the no-case submission, for her determination, was whether each of the criminal charges against the appellant was made out on the prosecution's evidence. Neither type of offence?

[70] We are of the view that neither type of offence was made out, when assessed against the stated authorities, informations and evidence.

Charge contained in Information 14009/2013

[71] Section 14(1)(b) of the CPA, under which the appellant was charged, provides:

> "14. – (1) A public servant commits an act of corruption if he–
>
> (a) …
>
> (b) in the performance of his public functions does any act or omits to do any act for the purpose of obtaining any illicit benefit for himself or any other person;"

[72] The CPA does not define 'illicit', but its ordinary meaning is - an act that is not permitted or is unlawful.

[73] It is also useful to set out section 4.2(1) of the Government of Jamaica Handbook of Public Sector Procurement Procedures 2014, partly because there was evidence on the appellant's case that he had declared his interest in GM&CSL before these contracts were awarded. It provides:

> "A Public Officer shall declare any relationship with a bidder, contractor or consultant and shall take no part in either the decision-making process or the implementation of any contract where such relationship exists… Disclosure may be made in writing or verbally, in the context of a meeting…"

[74] In relation to conflicts of interest, section 4.2.9 of the Government of Jamaica Staff Orders for the Public Service 2004, states that:

> "In order to address the potential for conflict of interest, officers should in all instances inform the appropriate authority of any such undertaking, seek clarification and get permission. Any such permission would be subject to periodic review."

[75] It was not contested before us that, as manager of parks and special projects, the appellant would have been performing a public function or was a public servant. Thus, we need only consider whether in that capacity he had the authority to award any contract to GM&CSL and whether he had in fact done so, as alleged. On the evidence before us the appellant had no such authority, was not involved in the approval process and did

not award any contract to GM&CSL. He had also declared his interest as a shareholder in the company.

[76] The evidence reveals further that this contract was awarded by way of the round robin process and approved by the executive director. The appellant's name did not appear in the list of members of the procurement committee. The learned judge seemed to have placed heavy reliance on the appellant's signature being on a document which verified that the NCC's procedures had been followed. The question was a practical one. Did the appellant's signature on a document which he signed in the course of his ordinary job responsibilities, constitute approval of a contract to himself? The evidence was that he signed documents in his capacity as manager of parks and gardens as verification that the procurement exercise accorded with the NCC's process for procuring services; not that a particular service should be procured.

[77] As already indicated, the witnesses with specific knowledge of how contracts were approved said that the appellant would not have participated in the approval of the contested contracts for GM&CSL. Notably, Colonel Allan Douglas, who was chairman of the NSWMA's procurement committee, said that the cheques which bore his signature and the executive director's had been "justifiably prepared" and he would have satisfied himself, before signing, that all the procurement procedures had been followed.

[78] The prosecution had a duty to lead credible evidence to satisfy the ingredients of the offence. It was required to prove, among other things, that: (i) the appellant while performing his public functions as manager of parks and special projects granted to GM&CSL a contract in the amount of $624,300.00; (ii) the work was done; and (iii) the appellant obtained for himself or some other person an illicit (unlawful) benefit in breach of the statute. The prosecution failed to lead any evidence that the appellant granted the contract to GM&CSL. Applying the first element of Lord Lane's observations in **R v Galbraith**, this was dispositive of that charge. The no-case submission ought therefore to have succeeded, in respect of this charge, without the need to consider whether any of the other essential elements had been satisfied.

Charge contained in informations 17124/14 to 17129/14

[79] These informations pertain to the second offence which was that the appellant improperly used confidential information to secure a benefit to himself. To succeed in these informations, the prosecution needed to establish that the appellant violated section 14(6)(a) of the CPA, which provides:

> "(6) Any public servant who improperly uses for his own benefit or that of a third party –
>
> (a) any classified or confidential information that he obtains as a result of or in the course of the performance of his functions; …
>
> (b) …
>
> commits an act of corruption."

[80] There was no evidence specific to information 17124/14. We therefore found no basis for the learned judge's finding that those allegations were made out. Also, the evidence did not establish that the applicant improperly used confidential information to his benefit, in any of the following informations.

Information 17125/14 -$ 2,685,000.00

[81] This contract was authorised by way of the round robin process and approved by the executive director. The evidence did not establish any materiality in the appellant's signature and name which were said to be above the certification that NCC procedures had been followed (that exhibit was missing from the record of proceedings).

Information 17126/14- $924, 000.00

[82] This contract was awarded by way of the round robin process and the appellant's name did not appear in the list of procurement committee members. Although he signed the purchase requisition form, the purchase order was authorised by the executive director who also approved the contract.

Information 17127/14- $2,422,500.00

[83] The executive director authorised the purchase order and approved this contract. The appellant signed as head of department that the work was satisfactorily completed. This was not material to the contract being approved and completion of the works was not in issue.

Information 17128/14 - $2,930,775.00

[84] The evidence was that the procurement for the award of the contract was done by round robin and the executive director authorised the purchase.

Information 17129/14 - $3,209,000.00

[85] There was no date in the copy information, and no evidence in the record of proceedings, in relation to this information.

[86] We make the observation, as did counsel on both sides, that most of the evidence (including exhibits) that were material, in this case, was elicited on the defence's case.

[87] At page 108 of the notes of evidence, the learned judge documented these findings: "Mr Mclean testified that the accused would be aware of procurement going on for his department. The accused would know of contracts coming up. He would be aware of the scope of work to be done…Mr Audley Mclean, the internal procurement chairman testified that he cannot say as a fact that the [appellant] was not part of the procurement committee at the time he was [manager for parks and gardens] …".

[88] However, as indicated previously, the learned judge confirmed in letter, dated 19 October 2021, that there was no evidence from Mr Audley Mclean. We also note that Mr Bloomfield, whom she said had given that evidence (instead of Mr McLean), did not agree that the appellant would be in a position to know what bid to make or who the competitors were. His evidence, broadly, was that the appellant would know when a contract was

coming up for his department but he would not sit on procurement committees which were tasked with deciding the award of contracts to GM&CSL.

[89] In our view, there was no evidence, at the close of the prosecution's case (or at all), to support the learned judge's finding that the appellant improperly used confidential information to procure the contracts. The Crown had failed to identify any such confidential information and also failed to say how any piece of confidential information was improperly used, for the appellant's benefit or that of a third party. Nor was any document adduced in proof of those allegations.

[90] As with the other offence, the learned judge should have stopped the case at the end of the prosecution's case since the prosecution had failed to establish the essential elements of this offence in any of the informations.

[91] And, there is more. There was no evidence from Detective Sergeant Fowler, the investigating officer as to the offences charged and the basis on which the charges were instituted against the appellant.

Separate legal personality (ground (c))

[92] Given the submissions on supplemental grounds (a) and (b), we took the view that there was no need to hear counsel on ground (c).

Conclusion

[93] The evidence before the learned judge at the end of the prosecution's case was woefully insufficient to establish a prima facie case against the appellant on any of the charges. Specifically, there was no proof of an act or omission which would have been perpetrated for the purpose of obtaining an illicit benefit for the appellant or that he had received confidential information about tenders which would have benefitted him when GM&CLS competed for any of the contracts described. In those circumstances, the no-case submission should have been upheld.

[94] It is for these reasons that we made the orders set out at paragraph [2].