BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 10 of 2018

BETWEEN:

ANDERSON RYAN INCE **Appellant**

AND

THE QUEEN **Respondent**

Before: The Hon. Rajendra Narine, The Hon. Francis Belle and The Hon. Jefferson O. Cumberbatch, Justices of Appeal

2021: July 22, November 2

2022: March 15, July 8

Ms. Angella Mitchell-Gittens in association with Mr. Martie Garnes for the Appellant

Ms. Olivia Davis in association with Ms. Asante Brathwaite for the Respondent

DECISION

NARINE JA:

BACKGROUND

[1] On the 17 October 2017, the appellant was found guilty of the offences of theft and money laundering of BDS$1,118,500 belonging to the Psychiatric

Hospital. He was sentenced to a term of 10 years on each count, less 254 days spent in custody, to run concurrently from the date of sentence, 13 June 2018.

[2] The appellant was employed as an Accounts Clerk at the Psychiatric Hospital, which afforded him access to the computer system known as "smartstream". It was the prosecution's case that the appellant used his knowledge of the system, and the confidence of his senior officers to dishonestly obtain the sum of $1,118,500, which he then used to acquire expensive items such as motor cars and jewellery.

[3] The appellant elected not to give sworn evidence or to call witnesses on his behalf. Instead, he gave an unsworn statement in which he admitted that he was an accounts clerk and his duties included the creation of local purchase orders (LPO), and the entry of these orders into the system. However, before the LPO is created, requisitions must be made by the Senior Store Keeper and the head of the Maintenance Department, and submitted to the accounts section for approval by the accountant and the senior accountant. When the goods or services are delivered, the invoices are attached to the LPOs and submitted to the accounts section for verification by the accountant and the senior accountant. They are then handed to the accounts clerk who enters them into the system. To access the system, one needs to enter a password created by the user and known only to him. To access the smartstream system,

one needs to enter another password known only by the user. After the LPOs are entered into the system, vouchers are created based on the invoices and the list is sent to the accountant and senior accountant for approval.

[4] An important aspect of the defence was that as a clerical officer the appellant was not involved in the assignment of suppliers, the approval of requisitions or the verification of vouchers, which required the input of the accountant and the senior accountant.

[5] The accountant and senior accountant gave evidence that they had often accessed their password in the presence of the appellant.

[6] The prosecution's case was that the appellant was able to have the names Anthony Nurse and Terry Ann Badenock entered into the system as suppliers, and that the appellant often volunteered to collect payable orders from the Treasury, although it was not part of his duties to do so. The evidence revealed that the payable orders to Nurse and Badenock were in batches collected by the appellant. An audit conducted for the financial years 2004 and 2005 revealed that there was no documentation supporting the 42 payments made to Anthony Nurse, and the two payable orders in favour of Badenock.

[7] Anthony Nurse did not give evidence at the trial. He disappeared after the irregularities were discovered. However the prosecution put into evidence

several cheques and payable orders made in favour of Anthony Nurse, and established that at least on one occasion, one such cheque was presented to the teller at the Wildey Branch of CIBC First Caribbean International Bank, and deposited to the account of Anthony Nurse.

[8] Ms. Badenock, however, gave evidence that the appellant had solicited her assistance, in return for which he helped her financially. The appellant had told her that he was involved in selling vegetables. She assisted the appellant in receiving the proceeds of two cheques payable to her in the sum of $20,000.00 and $10,000.00.

[9] In his unsworn statement the appellant stated that his only connection with Anthony Nurse was seeing him at the hospital where he was engaged as an electrician. As for Ms. Badenock, he stated that he assisted her with small donations to purchase groceries and pay utility bills. That was the extent of his relationship with her.

GROUNDS OF APPEAL

[10] **Ground 1**

The learned trial judge failed to adequately remedy the prejudice caused to the appellant by the prosecution's emotionally charged and inflammatory closing address.

Ground 2

The learned trial judge erred in law by allowing the prosecution to admit evidence which was more prejudicial than probative.

Ground 3

The learned trial judge erred in law in directing the jury on the standard and burden of proof.

Ground 4

The learned trial judge erred by failing to direct the jury with respect to the requisite standard of proof with respect to each element of the offence.

Ground 5

The learned trial judge erred in law by misdirecting the jury as to what constituted evidence of money laundering.

Ground 6

The learned trial judge erred in law when she misdirected the jury as to the approach to take when identifying discrepancies.

Ground 7

The learned trial judge erred in the following ways when sentencing the appellant:

i. **In the manner in which the breach of trust was analyzed.**

ii. Failing to appropriately take into account the mitigating factors in her sentencing remarks.

iii. Failing to take into account the excessive delay between charge and conviction.

Ground 8

The verdict is unsafe and unsatisfactory.

GROUND 1

[11] The appellant contends that the prosecutor made emotionally charged and inflammatory remarks in her closing address which the trial judge failed to address in her summing up, as a result of which the verdict is unsafe.

[12] The remarks which form the basis of the complaint are:

(i) "He used his computer savvy, his technological intelligence and he raped the government system in Barbados…."

(ii) "The only person who does not have either an intimate relationship with him or a personal relationship with him, thank God she knew how to do her job was Ruth Francis, and if it was up to me, she would have an award or she would get some kind of increase…."

(iii) "That thing nearly broke my heart, when I was outside I quarrel with Mr. Seale and Mr. Thomas so bad, you would think it was me. I say that man could be serious? That is what he said in his …. Terryann Badenock did him a big favour man, twice. Wrote cheques for him on the phone, took instructions. She was just a lady in need and I have a soft spot for her because of the season that this man found her in."

(iv) "You know he made her take a bus home. The least you could do, you send a taxi for a woman 'cause you want something done, you got to look at these things. This is a man that sits in the dock, that is the kind of person he is. He ropes in a woman to do his dirty work and when it is done the woman got to take the bus all the way back to St. Peter. I have a problem with that, but she is just good for donation."

[13] It is well settled that a prosecutor must conduct himself as befitting his role as a Minister of Justice. His role is not to seek to secure a conviction at all costs. He must not be unfair to the accused. This does not mean that he is required to be bland and uninspiring in his presentation. He is entitled to be forceful and robust in his cross-examination and address, as long as he does not cross the line and make use of inflammatory or emotionally charged comments, which may deflect the jury from a sober and dispassionate consideration of the evidence. Effective prosecutors often possess a certain dramatic flair which they use to hold the attention of the jury. In Caribbean jurisdictions, prosecutors often deliver their addresses in a flamboyant style using the local vernacular to connect with the jury. This is entirely proper and acceptable. However, prosecutors must always conduct themselves with propriety and sobriety, befitting the dignity of the court. (**See: Benedetto v. R (2003) 62 WIR 63 PC; Huggins and Others v State [2009] 2 LRC 295**).

[14] In **Randall v R [2002] 5 LRC**, a Privy Council appeal from the Cayman Islands, Lord Bingham noted that it was not every departure from good practice which renders a trial unfair. He went on to state at para 28:

> **"Inevitably, in the course of a long trial, things are done or said which should not be done or said. Most occurrences of that kind do not undermine the integrity of the trial, particularly if they are isolated and particularly if, where appropriate, they are the subject of a clear judicial direction. It would emasculate the trial process, and undermine public confidence in the administration of criminal justice, if a standard of perfection were imposed that was incapable of attainment in practice. But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty."**

[15] The question is whether the remarks of the prosecutor were "so gross, or so persistent or so prejudicial, or so irremediable" as to render the trial unfair or the conviction unsafe.

[16] There can be little doubt that the prosecutrix was forceful in her address, and painted an unflattering portrayal of the accused, as a manipulative and selfish individual who used others, particularly vulnerable women to achieve his fraudulent purposes. While her language was at times strong, we do not believe that the prosecutrix crossed the line and descended into unfairness. Her comments, though strongly critical of the accused's conduct, were in fact

grounded in the evidence. There is no requirement for a prosecutor to be nice to an accused person. As long as his remarks are supported by the evidence, the prosecutor is entitled to make them albeit that they may cast the accused in a negative light.

[17] However, the use of the word "rape" to describe the act of appropriation of the monies from the state, falls into a different category. The word "rape" denotes the sexual defilement of a person without the consent of that person often accompanied by violence. It may instil in the listener feelings of revulsion or disgust. It is a strong word which excites a negative emotional reaction in the average person. The same meaning may have been communicated by the use of the word "plunder" or "pillage" or simply "robbed". However, although we consider that the use of the word "rape" was overly emotive, we recognize that in the heat of doing battle in an adversarial system, an advocate may employ language that, in hindsight, may be considered too emotive.

[18] The issue for us to decide is whether the remarks of the prosecutrix, taken as a whole in the language of Lord Bingham in **Randall**, were so gross, persistent, prejudicial or irremediable, as to render the trial unfair and the verdict unsafe. Having given mature consideration to the issue, we conclude that the remarks did not rise to this threshold.

[19] Accordingly, we find no merit in this ground.

GROUNDS 2 AND 5

[20] Grounds 2 and 5 may conveniently be taken together. In ground 2 the appellant complains that the trial judge admitted evidence that was more prejudicial than probative. In ground 5, the complaint is that the trial judge misdirected the jury as to what constituted evidence of money laundering. The evidence referred to under both grounds is the same.

[21] The evidence that is targeted under these grounds is that of Angela Reifer, Anthony Holder, Terryann Badenock and Marsha Gill.

[22] It was Marsha Gill's evidence that she was the appellant's financèe and she lived with him for 5 - 7 years. She testified that the appellant bought her a Toyota Platz motor car and items of jewellery from Columbian Emeralds which Angela Reifer identified as items sold by Columbian Emeralds, and for which she was able to provide a value. She identified a chain and diamond pendant set in 14 carat gold which she estimated would have cost about $3,000.00 (US) and a pair of matching earrings which she estimated would have cost about $4,000.00 (US). She also identified three diamond rings which she valued at $2,000.00 (US), $3,000.00 (US) and $6,000.00 (US). The evidence of this witness was not challenged by cross-examination.

[23] Anthony Holder was the manager of a transport business dealing in taxis and hired cars. He accompanied the appellant to purchase a 2004 Toyota Corolla car, which he estimated would have cost between $35,000.00 to $40,000.00 in 2005. He drove the appellant in this car until the appellant got his driver's licence sometime in 2008. He became friends with the appellant, who advanced him two loans in the sum of $15,000.00 and $25,000.00. Mr. Holder was not cross-examined by the defence. His evidence remains unchallenged.

[24] Terryann Badenock testified that the appellant told her that he had a side business supplying the hospital with vegetables and he outlined a plan under which she would benefit financially. He requested her National Insurance Number, her National Registration Number, the correct spelling of her name and her address so that he could enter her into the smartstream system as a vendor. He subsequently telephoned Ms. Badenock and told her that he was going to the Treasury to collect a cheque, and requested her to meet him in town so that she could deposit the cheque. The witness was unable to leave her home to meet the appellant, who then told her he would go ahead and deposit the cheque into her account at RBTT. The appellant had previously asked for her account number. The cheque was in the sum of $20,000.00. Two hours later the appellant called the witness, and told her that he was unable to deposit the cheque because she needed to sign a form. About 45

minutes later the appellant arrived at Ms. Badenock's home in St. Peter in a taxi, and took her back to the bank at Broad Street to sign the form. He directed her to a particular teller who had the cheque and a completed declaration of funds form for her signature. The witness subsequently wrote cheques in favour of the appellant drawn on the account. He requested her to make the cheques in smaller amounts for $5,000.00, $3,000.00 and $2,000.00, dated days apart. The witness gave evidence of a second cheque she received for the appellant in the sum of $10,000.00, which she deposited into her account and which she withdrew at the ATM in cash at the request of the appellant and handed over to him. The daily limit, she believed, was $2,000.00. The withdrawals were made every two to three days.

[25] The appellant submitted that the prejudicial effect of the evidence of these witnesses substantially outweighed its probative value. He further complains that there was no "real evidence" showing that he purchased the items or that they were purchased through the proceeds of crime.

[26] The submission seems to fly in the face of the evidence given by the witnesses. The evidence of the witnesses Marsha Gill and Aliciea Collymore (a former girlfriend of the appellant) clearly establishes that the appellant gifted them the items of jewellery. It was Marsha Gill's evidence that she went to Columbian Emeralds and selected the two rings herself. Aliciea Collymore

testified that the appellant gave her a necklace and earring set. The clear inference to be made from their evidence, in the absence of evidence to the contrary, is that the appellant purchased these items. It is worth noting that neither Ms. Gill or Ms. Collymore's evidence was challenged by cross-examination. The issue of whether the jewellery was purchased through the proceeds of crime is also a matter of inference for the fact finders, based on the disparity between the appellant's income at the time and the amounts that he expended on the jewellery, the cars, and the loans to Mr. Holder.

[27] Under ground 5 the appellant complains that the trial judge referred to the evidence of the purchases of the two motor vehicles and the expensive items of jewellery when she directed the jury on the offence of money laundering. The appellant submits that the evidence was speculative and prejudicial, in that no evidence was led as to the authenticity of the jewellery, the purchase price of the vehicles and whether these items were purchased by the appellant or not.

[28] The evidence as to the authencity and value of the items of jewellery was provided by Angela Reifer, who worked at Columbian Emeralds. She was able to identify the items as pieces sold by Columbian Emeralds, and through her experience and knowledge acquired through her employment at that establishment, was able to estimate the value of the items. Likewise, Anthony

Holder was in the transport business dealing with taxis and hired vehicles. He accompanied the appellant to purchase the 2004 model Toyota Corolla, which he estimated could have cost between $35,000.00 to $40,000.00.

[29] The evidence of the witnesses can hardly be described as speculative. However, it may be described as "prejudicial" to the appellant in the non-technical sense in that, if accepted by the jury, the evidence may tend to show that the appellant was guilty of the offences charged. In this sense, all evidence proffered by the prosecution is prejudicial to an accused person.

[30] However, the term "prejudicial" has a more technical meaning in the criminal law. The term is properly used where the prejudicial effect of the evidence outweighs any probative value it may have. This may result in unfair prejudice to an accused person.

[31] In **Dwayne Omar Alleyne v The Queen** Criminal Appeal No. 9 of 2016, Goodridge JA, at paras 28-30 referred to Australian authorities which provide some insight into the term "unfair prejudice."

[32] In **Papakosmas v The Queen** [1999] HCA 37, the High Court of Australia defined unfair prejudice at para 91 as follows:

> **"[91] Evidence is not unfairly prejudicial because it makes it more likely that the defendant will be convicted. In R v BD, Hunt CJ at CL pointed out:**
>
> **"The prejudice to which each of the sections [ss135,136 and 137] refers is not that the evidence merely tends to establish the**

> **Crown case; it means prejudice which is unfair because there is a real risk that the evidence will be misused by the jury in some unfair way."**

[33] At para 92, McHugh J cited the following passage from the Interim Report of the Australian Law Reform Commission:

> **"[92] … By risk of unfair prejudice is meant the danger that the fact-finder may use the evidence to make a decision on an improper, perhaps emotional, basis, i.e on a basis logically unconnected with the issues in the case. Thus evidence which appeals to the fact-finder's sympathies, arouses a sense of horror, provokes an instinct to punish, or triggers other mainsprings of human action may cause the fact-finder to base his decision on something other than the established propositions in the case. Similarly, on hearing the evidence the fact-finder may be satisfied with a lower degree of probability than would otherwise be required."**

[34] In **Dupas v The Queen** [2012] VSCA 328 (December 2012), the Court of Appeal of Victoria stated:

> **"The Evidence Act does not define the term 'unfair prejudice'. Consistently with the common law, it has been interpreted to mean that there is a real risk that the evidence will be misused by the jury in some unfair way. It may arise where there is a danger that the jury will adopt 'an illegitimate form of reasoning' or 'misjudge' the weight to be given to that particular evidence. An inability to test the reliability of the evidence may carry with it the danger of such misjudgment. Evidence is not unfairly prejudicial because it inculpates the accused."**

[35] In our view, the evidence of the witnesses Marsha Gill, Anthony Holder, Aliciea Collymore, Angela Reifer and Terryann Badenock did not cause unfair prejudice to the appellant. Their evidence was probative and relevant

to establish that the appellant embarked on a pattern of spending that was inconsistent with the income he was earning at the time. The evidence provided an important item of circumstantial evidence which the jury could consider in deciding whether the appellant committed the offences. The evidence of Terryann Badenock in particular, was highly probative in that it established the modus operandi of the appellant and demonstrated how he was able to use the smartstream system to register a fictitious supplier, and ultimately to cause the system to generate cheques which he collected, and then used Ms. Badenock to receive the proceeds of his dishonest scheme.

[36] In our view the evidence would not have caused the jury to draw improper conclusions based on an emotional response to the evidence, neither would it have caused them to adopt an illegitimate form of reasoning, or to misjudge the weight to be given to any particular item of evidence, or to be satisfied with a lower degree of probability, than would otherwise be required.

[37] In our judgment, the evidence of these witnesses possessed probative value, and did not cause unfair prejudice to the appellant.

[38] Accordingly, we find no merit in these grounds.

GROUND 3

[39] In ground 3, in his written submissions, the appellant complains at para 24:

> 24. It is a settled principle of law that the standard of proof in criminal trials is proof beyond a reasonable doubt and the

> burden of proof rests on the prosecution and never shifts. This burden of proof operates independently of the defence. This direction which is the last direction that the jury was given on this area operates to shift the burden.

[40] A careful perusal of the summing up provides no support for the submission that any direction of the trial judge operated to shift the burden of proof. Quite to the contrary. At pages 1016-1017 of the summing up the judge made it clear that the burden of proof rested squarely on the prosecution:

> **"In a criminal case then the burden or obligation or onus or proof of the guilt of the accused is placed squarely on the Crown. That burden of proof rests with the Crown and never shifts to the accused. There is no burden whatsoever on the accused to prove any fact or issue that is in dispute before you. There is no burden to prove that he is innocent, he does not have to prove anything. That onus rests upon the prosecution in respect of every element of the charges. It is not for the accused to prove his innocence but for the prosecution to prove his guilt and to prove it beyond reasonable doubt."**

[41] At page 1018 lines 6-8, the trial judge again emphasizes:

> **"As I have said before, the burden of proving the case remains on the Crown and never shifts to the accused."**

[42] On the same page, the judge directed the jury that if they accept the unsworn statement of the appellant, then they must bring in a verdict of not guilty. She goes on to remind the jury that there is no obligation on the accused to persuade the jury to accept his evidence. However, it was for the prosecution to satisfy the jury beyond reasonable doubt that they should reject the

statement as a reasonably possible version of the facts. She further reminded the jury that if the appellant's evidence leaves them in reasonable doubt as to whether the prosecution has proved any element of the offence or any essential fact that it must prove, then they should return a verdict of not guilty. She then adds:

> **"In other words you do not have to believe that the accused is telling you the truth before he is entitled to be acquitted. If at the end of your deliberations you find that there is a reasonable possibility that the version presented by the defence is true, then the Crown has failed in its obligation to persuade you of the accused's guilt beyond reasonable doubt."**

[43] It is readily apparent from the above directions that the trial judge made it clear that the burden of proof remained on the prosecution throughout the trial. Her directions as to how they should approach the unsworn statement cannot be construed as shifting the burden of proof unto the appellant.

[44] Accordingly, we find no merit in ground 3.

GROUND 4

[45] Under ground 4 the appellant submits that the trial judge misdirected the jury in the direction she gave with respect to the standard of proof required in examining the circumstantial evidence,

[46] The offending direction is to be found at page 1036 of the record:

> **"The prosecution first asked the jury to find certain basic facts established by the evidence. <u>Those facts do not have to</u>**

> **be proved beyond reasonable doubt. Taken by themselves they cannot prove the guilt of the accused. The jury is then asked to infer or conclude from the combination of those established facts that a further fact or facts existed. The ultimate fact the Crown asked the jury, to find based upon the basic facts is that an accused person is guilty of the offence charged." (Emphasis added)**

[47] The direction is repeated at page 1037 line 17 to page 1038 line1:

> **"The correct approach is first to determine what facts you find established by the evidence. As I have already told you, any particular fact to be taken into account by you, does not need to be proved beyond reasonable doubt. You then consider all of those facts together as a whole and ask yourself whether you can conclude from those facts that the accused is guilty of the offence charged. If such a conclusion does not reasonably arise, then the Crown's circumstantial case fails because you are not satisfied of guilt beyond a reasonable doubt." (Emphasis added)**

This direction is repeated almost verbatim at page 1180 lines 11-18.

[48] The directions referred to in the preceding two paragraphs have caused us some concern. We have not previously come across such a direction in this jurisdiction. This direction appears to be inconsistent with the approach approved by Sir David Simmons CJ in **Williams et al v The Queen** Criminal Appeals Nos. 11 and 12 of 2001 at para 46:

> "It should be remembered that, in a case dependent upon circumstantial evidence, the jury are required to draw inferences from the total circumstances of the case. As ***Lord Cairns*** put it in ***Bellhaven and Stenton Peerage (1875) 1 App. Cas. 278*** at 279, the jury must consider "the weight which is to be given to the united force of all the circumstances put together." These

> circumstances from which the inference should be drawn must be established beyond reasonable doubt."

[49] The direction of the trial judge that the individual items of circumstantial evidence do not have to be proved beyond reasonable doubt, originates from an Australian jurisdiction. **The Civil Trials Bench Book (2007 ed.)** published by the Judicial Commission of New South Wales provides specimen directions for guidance of trial judges in cases where the prosecution relies on circumstantial evidence to prove guilt. The Bench Book draws a distinction between "link in the chain cases" and "strands in a cable" cases.

[50] The general principle as outlined at para [2-510] of the Bench Book is that no particular fact or circumstance relied upon needs to be proved beyond reasonable doubt. However, where one or more of the facts is or are so fundamental to the process of finding of guilt, that fact or facts must be proved beyond reasonable doubt. Such a fact is referred to as an "intermediate" fact being an indispensable link in a chain of reasoning in drawing an inference of guilt. This type of case is referred to as a "link in the chain" case.

[51] The "strands in a cable" type of case is different. In this type of case there is or are no particular fact or facts which is or are fundamental or indispensable to a finding of guilt. The strength of the case derives from the combination of all the circumstances which leads to a conclusion of guilt beyond reasonable doubt. In this type of case no individual fact or circumstance needs to be

proved beyond reasonable doubt. The specimen direction suggested in para [2-520] of the Bench Book bears a close resemblance to the directions given by the trial judge in this case:

> "The correct approach is first to determine what facts you find established by the evidence. As I have already told you, any particular fact to be taken into account by you does not need to be proved beyond reasonable doubt. You then consider all of those facts together as a whole and ask yourself whether you can conclude from those facts that [*the accused*] is guilty of the offence charged. If such a conclusion does not reasonably arise, then the Crown's circumstantial case fails because you are not satisfied of guilt beyond reasonable doubt. Of course, it follows that you must find [*the accused*] not guilty.
>
> But if you find that such a conclusion is a reasonable one to draw based upon a combination of those established facts then, before you can convict [*the accused*], you must determine whether there is any other reasonable conclusion arising from those facts that is inconsistent with the conclusion the Crown says is established. If there is any other reasonable conclusion arising from those facts that is inconsistent with the guilt of [*the accused*], the circumstantial case fails because you are not satisfied beyond reasonable doubt of [*the accused's*] guilt.
>
> You should understand that drawing a conclusion from one set of established facts to find that another fact is proved involves a logical and rational process of reasoning. You must not base your conclusion upon mere speculation, conjecture or supposition."

[52] It is clear from the judge's almost verbatim adoption of this suggested guideline that she regarded this case as a "strands in a cable" case, in which no particular fact or circumstance relied upon as proof of guilt, requires proof beyond reasonable doubt. In fact at page 1036 lines 3-7, the judge makes

reference to an analogy made by another judge who compared circumstantial evidence to "a rope comprised of several cords".

[53] In her summing up the trial judge identified the various facts and circumstances on which the prosecution relied to establish its case. These were:

(i) the appellant was employed in the accounts department and had access to the smartstream system, in which he had done several courses;

(ii) the user ID for all the transactions entered for Anthony Nurse and Terry-Ann Badenock was "Ince A";

(iii) Harold Gill, the Accountant who was a first level approval officer had often accessed the system in the presence of the appellant, using the password "Password" since he had difficulty remembering the password assigned to him;

(iv) Harold Gill's password was used to approve payments while he was on holiday, when he did not go to his office or access his computer;

(v) Lyman Phillips, who was the Assistant Hospital Director, and acted as a second level approval in the absence of Mr. Piggott, the Senior Accountant, often enlisted the assistance of the appellant to get on the smartstream system, when he was unable to do so on his own computer. On these occasions he accessed the system on the appellant's computer in his presence, using his own password;

(vi) the appellant was a trusted and well-liked employee who was permitted to pick up payable orders from the Treasury, even though he was not a messenger;

(vii) all of the payable orders made out to Anthony Nurse and Terry-Ann Badenock were collected by the appellant;

(viii) Ms. Badenock testified that the appellant approached her with a business proposition and requested her personal information which he told her he was entering into the computer as they spoke on the telephone;

(ix) Ms. Badenock further testified that she assisted the appellant by depositing the payable orders and paying out the proceeds to the appellant in smaller amounts;

(x) there was evidence of the purchase by the appellant of two motor vehicles, expensive items of jewellery and loans to Anthony Holder in the sum of $15,000.00 and $20,000.00 and,

(xi) the appellant's earnings as a clerk was about $2,000.00 after deductions for income tax and national insurance.

[54] In his unsworn statement the appellant describes in some detail the process by which local purchase orders (LPOs) are created, and the requirement for approval of transactions by the Accountant and Senior Accountant, or the Hospital Director. He explained that as an entry clerk he could not approve, first approve or second approve, since the system required various levels of security. He could only enter into the system requisition and invoices and LPO's that were passed to him by heads of management, which would be the Senior Accountant, Accountant or the Hospital Director.

[55] While the appellant does not directly answer the allegation that he used the smartstream system to misappropriate funds, the logical conclusion to be

drawn from his evidence is that he could not have stolen the money, since the system required first and second levels of approval, which were beyond his authority as an entry clerk. Interestingly, he did not deny that he was proficient in the working of the smartstream system, or that he had opportunities to observe Mr. Gill and Mr. Phillips as they entered their passwords into the smartstream system, or that he volunteered to collect the payable orders from the treasury, or that he collected all the payable orders made out to Anthony Nurse and Terry-Ann Badenock.

[56] Further, in his evidence the appellant made no mention of his purchase of the two motor vehicles, or the expensive items of jewellery he gifted to Alicia Collymore and his fiancée Marshall Gill. Nor did he mention his loans of $15,000.00 and $20,000.00 to Anthony Holder. With respect to the evidence of Ms. Badenock, the appellant admitted to knowing her and giving small donations to her to assist her to purchase goods and pay utilities. He did not specifically address her evidence with respect to his business proposal, her receipt of the payable orders, her evidence as to what transpired at the bank when he attempted to deposit the cheque for $20,000.00 into her account, and her evidence of paying out the money to him by cheque in smaller amounts.

[57] As noted above, the direction of the trial judge with respect to the standard of proof to be satisfied by the prosecution in respect of each item or

circumstantial evidence appears to be a novel one in this jurisdiction. In the classic formulation of the direction the jury is reminded that the strength of a case based on circumstantial evidence derives from the coincidence of the various facts and circumstances. No direction is usually given with respect to the standard of proof to be applied to each individual item. The jury is directed that they must consider whether all the facts and circumstances taken together lead them to the inference that the accused is guilty beyond reasonable doubt. In other words, in the classic formulation, the direction on the standard of proof beyond reasonable doubt relates to the ultimate inference of guilt, not to each separate item of circumstantial evidence.

[58] The decision of the full court of the High Court of Australia in **Shepherd v The Queen (1990) 170 CLR 573** contains a useful discussion on the standard of proof to be applied in cases based on circumstantial evidence. The court sought to explain certain dicta contained in the earlier decision of the court in the case of **Chamberlain v The Queen (1984) 153 CLR 521** which was interpreted in later decisions to lay down the proposition that juries must be directed that they cannot use a fact as a basis for inferring guilt unless that fact is proved beyond reasonable doubt. This interpretation of **Chamberlain** was roundly rejected by the court.

[59] The following guidance may be gleaned from the judgement of Dawson J in **Shepherd** at para 5:

> (i) it may sometimes be necessary or desirable to identify those intermediate facts which constitute indispensable links in a chain of reasoning towards an inference of guilt. Not every fact is of that character;
>
> (ii) where it is appropriate to identify an intermediate fact as indispensable to an inference of guilt, it may well be appropriate to direct the jury that they must find that fact to be proved beyond reasonable doubt;
>
> (iii) where the evidence consists of strands in a cable other than links in a chain, it will not be appropriate to give such a direction;
>
> (iv) the direction should not be given where it would be unnecessary or confusing in the context of the particular case;
>
> (v) it will generally be sufficient to tell the jury that the guilt of the accused must be established beyond reasonable doubt, and where any other inference consistent with innocence is reasonably open on the evidence, they must entertain that doubt in favour of the accused.

[60] An essential principle that underlies every criminal trial is that the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. In establishing guilt, the prosecution must prove each ingredient of the offence beyond reasonable doubt. It is not required to prove every item of evidence beyond reasonable doubt. Some items of evidence may not be relevant to a finding with respect to an ingredient of the offence or to the ultimate finding

of guilt. Items of evidence may vary in terms of importance or weight in the context of the particular case. However, where the particular fact or circumstance is essential to a finding that an ingredient of the offence is proved, or to the ultimate finding or inference of guilty, such a fact or circumstance must be proved beyond reasonable doubt.

[61] It is not necessary or desirable to direct the jury on the standard of proof with respect to each item of evidence. This would no doubt be an onerous task in a case where the prosecution relies on a multitude of facts or circumstances, and may confuse the jury. What is important is that the jury understands that they must be satisfied beyond reasonable doubt of the guilt of the accused having considered the evidence as a whole, and having regard to the cumulative effect of the evidence. Of course, where a particular fact or circumstance is indispensable to a finding or inference of guilt, it is necessary to direct the jury that they must be satisfied as to the existence of that fact beyond reasonable doubt. These sentiments are reflected in the judgement of Dawson J at para 6:

> **"As I have said, the prosecution bears the burden of proving all the elements of the crime beyond reasonable doubt. That means that the essential ingredients of each element must be so proved. It does not mean that every fact - every piece of evidence - relied upon to prove an element by inference must itself be proved beyond reasonable doubt. Intent, for example, is, save for statutory exceptions, an element of every crime. It is something which, apart from admissions, must be proved by inference. But the jury may**

> **quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standard of proof. Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately."**

[62] The attorneys in this appeal did not address the Australian authorities in their original written and oral submissions. At an adjourned hearing we invited the Attorneys to provide us with written submissions as to whether and how these authorities apply to this appeal.

[63] In her further submissions, Ms. Davis considered the cases of **Chamberlain Shepherd** and **Hillier v The Queen [2008] ACTCA 3**, and **Davidson v The Queen [2009] WSWCCA 150**, on which the court had invited submissions. She submitted in essence that these authorities established that it was not necessary for the prosecution to prove each item of fact relied upon in a case based on circumstantial evidence beyond reasonable doubt. She referred to the cases of **Shepherd** and **Davidson** as support for the proportion that the jury must not be directed to approach the evidence in a "piecemeal" fashion or to consider the evidence "in separate and isolated compartments". The jury should be directed to consider the evidence as a whole and to draw the inference of guilt from the totality of the evidence applying the criminal standard of proof.

[64] In her further written submissions, Ms. Mitchell-Gittens applied the definition of "intermediate" facts, as espoused by Dawson J in **Shepherd**, as "indispensable links in a chain of reasoning towards an inference of guilt". She submitted that there were two intermediate facts in this case which needed to be proved beyond reasonable doubt. These were:

> (i) that the appellant issued the payable orders and received the proceeds from the cheques made in the names of Anthony Nurse and Terry-ann Badenock, and
>
> (ii) that the appellant did in fact buy the two vehicles and the items of jewellery.

[65] Ms. Mitchell-Gittens further discussed the issues as to whether the trial judge should have directed the jury on what constitutes "intermediate facts", and invite them to form their own opinion as to what items of evidence would fall within the definition. She submitted that without these directions, the jury would have applied the standard of proof on a balance of probabilities to the intermediate facts which required proof beyond reasonable doubt. On this basis, Ms. Mitchell-Gittens invited the court to conclude that the direction of the judge on the standard of proof required in respect of the circumstantial evidence was a material misdirection which rendered the convictions unsafe.

[66] We find merit in Ms. Mitchell-Gittens' submissions. Although, we do not find the "links in a chain" and "strands in a cable" distinction to be particularly

helpful, we consider this to be a case in which the jury needed to be satisfied beyond reasonable doubt of the following facts:

(i) the appellant had access to the smartstream system;

(ii) he was proficient in operating the system;

(iii) he was able to access the passwords of senior officials (the Senior Accountant, Accountant or Hospital Director) whose approval was required to enter the names of suppliers on the system, and to create requisitions and local purchase orders;

(iv) the appellant used his knowledge of the system and the passwords of the senior officers to have Terry-Ann Badenock and Anthony Nurse entered as suppliers and to create requisitions and local purchase orders, so that vouchers could be generated to have them paid for the supply of fictitious goods and services;

(v) through his relationship with senior officials, he was able to collect the cheques payable to Ms. Badenock and Mr. Nurse at the Treasury;

(vi) he was able to have the cheques paid into the accounts of Ms. Badenock and Mr. Nurse, and to have the proceeds paid to him;

(vii) he used the proceeds of his dishonest enterprise to obtain cars and jewellery and to provide loans to Mr. Holder.

[67] Earlier in our discussion on this ground, we noted that most of the items listed above were not controverted by other evidence. In fact in most cases the evidence was not challenged in cross-examination. If the jury had been properly directed on the standard of proof to be applied to the circumstantial

evidence, they may well have found these facts proved beyond reasonable doubt. Unfortunately they were expressly directed that these facts did not require proof beyond reasonable doubt. Having regard to the peculiar factual matrix in this case, we consider this to be a material misdirection.

[68] The directions that we have referred to from the Australian Bench Book have raised certain concerns, which we outline briefly below.

[69] The distinction between "links in a chain" cases and "strands on a cable" cases, is not very helpful in providing guidance to trial judges as to what the appropriate directions should be. Each case in which circumstantial evidence is relied upon, will be based on its own peculiar facts. It is for the trial judge to consider the facts carefully and to decide whether there are items of evidence which are indispensable to finding an inference of guilt. If the judge determines there are such facts or circumstances, the judge should draw them to the attention of the jury, being careful to direct them that it is for them to determine whether or not these facts or circumstances in fact possess such probative value that they are indispensable to finding an inference of guilt. The judge should further direct the jury that unless they find these facts and circumstances proved beyond reasonable doubt, they must not rely on them to support an inference of guilt.

[70] We find it unnecessary for the trial judge to use the terms "primary facts", "intermediate facts" and "final facts". These directions may confuse a jury. It is sufficient, in our view, for the judge to identify the various facts or circumstances that comprise the circumstantial evidence, and to invite the jury to consider whether, and which of, the various items of evidence are indispensable to drawing an inference of guilt. It is desirable that the judge provide some assistance to the jury in identifying such items, leaving it to them, as the finders of fact, to make the final determination.

[71] In most cases, the classic direction that the jury should consider the circumstantial evidence as a whole and to draw an inference of guilt from the totality of the evidence applying the standard of proof beyond reasonable doubt, will be adequate. While exceptional cases may arise where the sheer volume of facts and circumstances may justify a direction that the various items of circumstantial evidence do not have to be proved beyond reasonable doubt, in our view, such a direction is clearly unnecessary in the vast majority of cases, and may confuse a jury, when juxtaposed with the criminal standard of proof beyond reasonable doubt.

[72] We offer these words of guidance to trial judges subject to the guidance which we hope will ultimately be forthcoming from the apex court.

GROUND 6

[73] The trial judge gave extensive directions on the inconsistencies and discrepancies in the evidence. She explained that inconsistencies may occur where a witness gives evidence that is inconsistent with what he said on a previous occasion. She explained the meaning of "discrepancies", as occurring where two or more witnesses give different evidence about the same set of facts. She went on to remark that the most basic and obvious example of this is the difference between the prosecution's evidence and the evidence of the defence. It is this remark that is the subject of ground 6.

[74] Quite obviously, in any contested criminal trial there will be major and stark factual differences between the evidence led by the prosecution and that led by the defence. The term "discrepancy" is not usually used to describe such expected differences in the evidence led by opposing parties. It is usually used to describe differences in evidence given by witnesses called for the same party, whether prosecution or defence,

[75] While the example of discrepancy given by the judge was misconceived and unnecessary, we are unable to discern any prejudice to the appellant flowing from it. It is unsurprising that the appellant did not seek to develop this ground in his written submissions.

[76] Accordingly we find no merit in this ground.

GROUND 7

[77] The appellant contends that the trial judge's sentencing exercise was flawed in that:

(i) she erred in her analysis of the breach of trust factor;

(ii) she failed to properly take into account the mitigating factors; and

(iii) she failed to take into account the excessive delay between the charge being laid and the conviction.

[78] In response, counsel for the Crown contended that the judge did follow the guidelines laid down by the **Caribbean Court of Justice** (**CCJ**) in **Teerath Persaud v R [2018] CCJ 10 (AJ)** and took into account the mitigating factors of the offence and the offender in deciding the sentence to be imposed. It was further submitted that the trial judge did consider the issue of delay, and exercised his discretion not to apply a discount in respect of same. In addition, there was no error in principle in the sentencing exercise, and the sentence was not shown to be manifestly excessive.

[79] It would be useful at this stage to examine the sentencing remarks of the trial judge.

[80] The judge gave a brief summary of the facts of the case. She then considered the pre-sentence report, noting that the appellant was 43 years old, shared a good relationship with his family, was reported to be a respectful and

responsible person by his mother, and had no previous convictions. The judge considered the submissions of both counsel on sentencing. Mr. Gollop, for the appellant emphasized the previously clean record of the appellant, and suggested that the court should balance the principles of retribution and deterrence with that of rehabilitation. He suggested a sentence of 2 years as being appropriate.

[81] The judge further noted the submissions of Ms. Babb-Agard for the prosecution, who emphasized the aggravating factors of the offence including the quantum of money stolen, the breach of trust, the strategic planning involved, and the use to which the misappropriated funds were put. She further stressed the importance of maintaining public confidence in the system. She noted that the appellant had expressed no remorse for his actions, and did not cooperate with the police in their investigations. Ms. Babb-Agard alluded to two mitigating factors of the offender, namely that the appellant had no previous convictions and that the pre-sentence Report was favourable to him. She suggested a starting point of 10 years.

[82] Having considered the submissions of counsel, the judge referred to section 35(2) of the **Penal System Reform Act**, and concluded that a custodial sentence was justified in this case. She further noted section 36(2) of the **Act**

which mandates that the sentence should be commensurate with the seriousness of the offence.

[83] The judge considered in some detail the factors outlined in **R v Barrick (1985) 7 Criminal Appeal Reports** at page 142. These factors are:

(i) the quality and degree of trust reposed in the offender including his rank;

(ii) the period over which the fraud or theft was perpetrated;

(iii) the use to which the money or property was put;

(iv) the effect upon the victim;

(v) the impact of the offences on the public and public confidence;

(vi) the effect on fellow employees;

(vii) the effect on the offender himself, and

(vi) the history of the offender.

[84] The trial judge took into account the fact that the appellant did not assist the police in any way in their investigations and the absence of remorse shown by the appellant. She noted the substantial delay between the charge in 2006 and the start of the trial in 2017. She further referred to section 41 of the **Penal System Reform Act**, noting that the issue of rehabilitation is one of the main principles of sentencing. She took into account that the maximum penalty for theft is 10 years, and that for money laundering is 25 years imprisonment.

[85] The judge then arrived at a starting point of 8 years for both offences, taking into account the aggravating and mitigating factors of the offence. She then adjusted the starting point upwards by 2 years, since in her view the aggravating factors relating to the offender and the surrounding circumstances far outweighed the mitigating factors. The judge ultimately arrived at a sentence of 10 years for each offence, from which time spent in custody was deducted, leaving a term of 9 years 111 days for each offence to run concurrently.

[86] In **Teerath Persaud** the **CCJ** recommended a sentencing procedure to be followed by inferior courts in carrying out a sentencing exercise. The purpose of the exercise is to achieve a measure of consistency in sentencing, to avoid arbitrariness in imposing sentences, and to lay done a transparent process which could be reviewed by appellate courts.

[87] At para 46 of **Teerath**, the **CCJ** outlined a four step procedure in determining sentence:

> (i) the first step of the exercise involves a consideration of the objective seriousness of the offence. In determining the starting point, all the mitigating and aggravating features of the offence are examined and weighed;
>
> (ii) the sentencer is then required to consider the mitigating and aggravating factors of the particular offender. If the mitigating factors outweigh the aggravating factors of the offender, the starting point is adjusted downwards. If the aggravating factors outweigh the mitigating factors this

> results in an upward adjustment. If the aggravating and mitigating factors are evenly balanced, there is no adjustment to the starting point;
>
> (iii) if there is a guilty plea, the appropriate discount is applied to the sentence at this stage, and
>
> (iv) full credit is then given for time spent in pre-trial and pre-sentence custody.

[88] An examination of the sentencing remarks of the trial judge reveals that the procedure recommended by the **CCJ** in **Teerath** was not followed. While the judge did advert to the submissions of counsel, in which counsel identified the aggravating and mitigating factors of the offence and the offender, she did not state which of these factors, in her own view, she found to be applicable in this case. The judge did however apply the principles identified in **Barrick**, which provide useful assistance in determining the objective seriousness of the offence, although the seventh and eighth factors listed in para 83 ante, relate to the offender, and ought to be considered in the second stage of the sentencing exercise.

[89] The trial judge arrived at a starting point of 8 years. Although, this court would have preferred a more transparent examination of the mitigating and aggravating factors of the offence, we recognize that sentencing involves the exercise of a discretion. It is not an exact science, and courts may disagree on the figure to be used as a starting point. However in our view the starting

point of 8 years falls within a range within which reasonable disagreement is possible. We are not of the view that the starting point of 8 years is unreasonable having regard to the objective seriousness of the offences.

[90] However, it is at the second stage of the exercise that the trial judge, in our view, fell into error. Having arrived at a starting point of 8 years, she adjusted the sentence upwards by 2 years, stating that the aggravating factors relating to the offender "and the surrounding circumstances" justified an adjustment upwards. In making the upwards adjustment, the trial judge failed to identify the aggravating and mitigating factors or the "surrounding circumstances" that she considered.

[91] It appears, from remarks made by the trial judge before she determined the starting point, that the judge considered as aggravating factors of the offender, the failure of the appellant to assist the police in their investigations, and to his failure to show remorse for his actions. This court is of the view that the judge fell into error in considering these matters as aggravating factors of the offender. It is trite law that an accused person has a right to silence when questioned by the police, and a right not to incriminate himself by answering questions or assisting the police in their investigations. He also has a right to assert his innocence even after his conviction. He is not obliged to assist the police or to show remorse. However, if he does, those are factors which may

be rightly viewed as mitigating factors of the offender to be taken into account in sentencing. It does not follow however, that their absence could be regarded as aggravating factors.

[92] It is unfortunate that the trial judge did not engage in any analysis of the aggravating and mitigating factors of the offender, before abruptly adjusting the starting point upwards. The most disturbing aspects of this case was the serious breach of trust and pre-planning involved in the commission of these offences, the quantum of money misappropriated and the impact of the offences on public confidence in the system. But all these factors are to be taken into account in the first stage of the exercise in assessing the objective seriousness of the offences.

[93] The second stage of the sentencing exercise involves the concept of individualized sentencing. The appellant's antecedents and prospects of rehabilitation must be given due consideration. In this case the appellant's previously clean record, his favourable pre-sentence report, and his assessment as being at a low risk of re-offending must be placed in the balance. This court is of the view, that if these factors were examined and weighed, the starting point would have been adjusted downward. In our view, a reduction of two years would have been appropriate. This would have yielded a sentence of 6 years for each of the offences.

[94] The appellant has further complained that the judge failed to take into account the excessive delay between the charge being laid and the conviction.

[95] The offences were alleged to be committed during the period 1 August 2003 to 1 August 2005. The appellant was charged on 13 July 2006. He was indicted on 4 January 2016. His trial began on 19 September 2017, and a verdict of guilty was returned on 17 October 2017. The appellant was subsequently sentenced on 13 June 2018.

[96] We note the delay of one year and nine months between the indictment and the trial, and a further delay of eight months between the verdict and the sentencing. What causes this court some disquiet is the delay of some $9^{1/2}$ years between the charges being laid and the beginning of the trial. Neither side has sought to provide any explanation, or to apportion any blame for the delay. While it may well be that the appellant may have contributed in some way to the delay, in our view it is ultimately the responsibility of the State to bring him to his trial within a reasonable time in accordance with its obligations under section 18(1) of the Constitution.

[97] Although the trial judge made a passing reference to the delay in her sentencing remarks before she determined the starting point, she does not expressly set out precisely how it factored into the final sentence. One would expect that if she considered the delay was indeed inordinate, she would have

stated whether she was granting a discount from the final sentence, and the amount of that discount in the interests of clarity and transparency in the sentencing exercise. Her failure to do so suggests that the trial judge did not address her mind to the issue in arriving at the final sentence.

[98] It is clearly indisputable that the delay between the charges being laid and the indictment being preferred was inordinate, and the appellant should have been afforded a discount from the final sentence. This court considers a further discount of one year from the sentence of 6 years is reasonable in the circumstances. The final sentence will then be a term of 5 years, on each count, from which time spent in custody of 254 days is to be deducted. This leaves a sentence of 4 years and 111 days to be served by the appellant. However, the sentencing exercise may be rendered academic depending on how the court determines the issue raised in the final ground of appeal.

GROUND 8

[99] The appellant contends that the verdict is unsafe and satisfactory. As noted in our discussion of ground 4, we concluded that the direction of the trial judge that the facts and circumstances on which the prosecution relied as evidence of guilt, did not have to be proved beyond a reasonable doubt, was a material misdirection in this case.

[100] The question arises whether this material misdirection renders the verdicts unsafe and unsatisfactory. Adapting the test applied by the **CCJ** in **Carlton Junior Hall v The Queen 2020 CCJ 1 (AJ)**, the appropriate question for this court to answer, is whether this court is satisfied that the jury would have arrived at the same verdict had the erroneous direction not been given. If this court is so satisfied, then the verdicts will stand. If this count entertains a reasonable doubt that the same verdict would have been returned, then the conviction is unsafe, and should be set aside: See **Carlton Junior Hall** at para 55.

[101] In our view the misdirection on the standard of proof to be applied to the circumstantial evidence in this case is of such fundamental importance to the function of the jury, as the finders of fact, that this court entertains a reasonable doubt that the same verdicts would have been returned.

[102] Accordingly, we conclude that the verdicts are unsafe and unsatisfactory. It follows that we uphold the appeal against conviction and sentence.

DISPOSAL

[103] (1) The appeal is allowed. The conviction and sentence are set aside.

(2) We will hear the parties on the issue as to whether a re-trial should be ordered.

Justice of Appeal

Justice of Appeal Justice of Appeal