In the Court of Appeal For Bermuda

CRIMINAL APPEAL NO. 6 OF 2006

Between:

TERRENCE ST. PATRICK SMITH

Appellant

-V-

THE QUEEN

Respondent

Before: **Hon. Justice Nazareth, JA**
Hon. Justice Evans, JA
Hon. Justice Forte, JA

Date of Hearing: **13th & 14th November 2007**
Date of Judgment: **29th November 2007**

FORTE, JA:

REASONS FOR JUDGMENT

1. The appellant was convicted on the 29th March 2006, on 45 counts of an indictment each of which charged him with inducing the Bermuda Monetary Corporation to deliver to one Steven Barbosa certain Bermuda Housing Corporation (BHC) cheques, by falsely pretending that certain vouchers were genuine. He was sentenced to a total of eight years imprisonment. Due to the nature of the complaints made, it is necessary to give only a brief summary of the facts, which resulted in the convictions of the appellant.

2. The BHC has, as one of its functions, the restoration, renovation and maintenance of houses that belong to it and which are rented to "ordinary Bermudians". The appellant, at the relevant time, was employed to the BHC as a Property Officer. He had the authority to invite various contractors to work (i.e. do repairs, painting, concrete drive-way, etc) on the BHC houses. He was also charged with the responsibility of approving invoices for jobs done for the BHC, after checking that those jobs were actually done, as also that the financial charges for the jobs were correct.

3. The prosecution alleged that the appellant entered into an arrangement with the witness, Barbosa, for the latter to increase the value of the work claimed

on the invoices for jobs actually done, and also to tender invoices, in some cases, where no job had been done. He would, in turn, in his position as property officer, stamp the invoices with a red-stamp signifying that he had checked the claims and thereby giving approval for the payment of the amount claimed on the invoices. As a result, various officers of the BHC, acting upon his authorization, would issue cheques for the claimed amount. Each charge on the indictment was the result of each such transaction. When paid, Barbosa would lodge the total amount to his bank account and thereafter withdraw a share of the money, which he would hand over to the appellant. In some instances, Barbosa would use some of the proceeds of the fraud, to pay bills for the appellant on his (the appellant's) instructions.

4. In proof of its case, the prosecution relied on the evidence of Barbosa and that of the appellant's creditors, to whom Barbosa had paid money on the appellant's behalf.

5. The appellant filed a Notice of Appeal, which signified an intention to appeal against his convictions and sentences. The matter went before a single judge of appeal who refused leave to appeal against sentence, but who made no mention of the appellant's application for leave to appeal against conviction. The matter came before this court as a result of the appellant's request that the full court reconsider his application for leave to appeal his sentence. Since that request for a full hearing, the appellant filed no other document in pursuit of his desire to appeal, until the 9th November 2007 when Mr. Patrick O'Connor Q.C. filed proposed grounds of appeal.

6. Mr. O'Connor, Q.C. had the difficult task of applying for an extension of time within which to file the grounds of appeal, some 18 months after they should have been filed. He sought to convince this court that leave should be granted, by tracing the history of the proceedings since the appellant's conviction and sentence. He did that to demonstrate that the delay was not the fault of the appellant's. Instead, he maintained that it was due to the omissions of several counsel, whom the appellant had privately retained to pursue his appeal.

7. The appellant was dissatisfied with his attorney's (Mr. Scott's) conduct of the trial. He terminated that retainer after the trial and obtained the services of Mr. Richardson. Mr. O'Connor, Q.C. has shown, through an examination of the record, that although Mr. Richardson made some attempts to obtain the transcript of the trial proceedings, he made no attempt to file any ground of appeal. Mr. O'Connor further pointed out that Mr. Richardson was in possession of the 'Summing-Up' and therefore did not need the transcript to determine the grounds of appeal. He could have obtained the appellant's instructions in respect of his allegations of irregularities that occurred in the

conduct of the trial, which are now the subject of this hearing. Mr. John Perry, QC, was another attorney whom the appellant had retained. He, however, advised that there was only one weak ground of appeal, which would not justify him travelling from London.

8. In essence, the appellant blames the long delay in filing grounds of appeal on the irresponsible conduct of the attorneys he retained. Of prime example was his retainer of Mr. Richardson, whose services he was forced to terminate when the said attorney accepted the brief of the Premier in respect of allegations against the Premier in connection with The BHC: The same government agency that the appellant was charged with defrauding. Citing a conflict of interest, the appellant dismissed Mr. Richardson. The appellant then obtained the services of Ms. Harvey, who, in turn retained Mr. O'Connor, Q.C. to conduct the appeal on behalf of the appellant. Realizing the inordinate delay, Mr. O'Connor worked expeditiously to file some 15 grounds of appeal on behalf of the appellant. That was done on 9th November 2007; some 18 months after the appellant had been convicted and sentenced. Mr. O'Connor, Q.C., recognized and rightly submitted that the delay in filing grounds was "unacceptable". He however urged on us that the interest of the appellant, who was not at fault, should be balanced against the public interest in determining whether justice demanded that the appellant should be heard in spite of the long delay.

9. Counsel for the Crown, Mr. Ratnesser, opposed the application for extension of time within which to file grounds of appeal. He took the court through the proposed grounds, by way of preliminary consideration of each, and argued that they were without merit. Further, he maintained that the Rules of Court ought to be obeyed and submitted that the appellant should not be allowed to go "Queen's Counsel shopping" when the law restricted the time within which to act.

10. The proposed grounds addressed allegations regarding three different aspects of the case:

    (i) possible bias of two of the jurors;

    (ii) incompetence of the trial attorney, coupled with his refusal to act upon the instructions of the appellant;

    (iii) misdirection by the learned trial judge and the acceptance of inadmissible evidence.

11. In relation to allegations of incompetence of the trial attorney, Mr. O'Connor previously applied to remove the appeal from the list, on the basis that comments of counsel would be necessary, before any proper consideration could be given to that complaint. Nonetheless, he argued that if the Court

were to consider the issue of bias and found in favour of the appellant, then it might not be necessary to pursue the other grounds of appeal. We reserved that decision, until all the arguments in respect of the application for extension of time had been made.

12. After we heard submissions on the merits of the proposed grounds of appeal, we granted the application for extension of time within which to file and argue the following grounds, that were proposed:

Ground 1

"…The judgment of the Supreme Court should be set aside on the ground of wrong decisions of law and/or because there was a miscarriage of justice.

1. The actual or apparent impartiality of the jury was fatally compromised by the presence on the jury of two jurors. The appellant was thereby deprived of his right under ***Article 6(i) of the Constitution*** to a fair hearing "…by an independent and impartial court established by law." This was of particular importance in this case because of the high level of publicity about the police investigation and of hostility towards the appellant. The appellant relies upon ***ABDROIKOV*** [2007] WLR 2679."

We granted leave with respect to one juror only i.e. Mr. Gerald Simons.

Ground 4

'The learned trial judge wrongly admitted into evidence as an exhibit a record of payments, at various times called the 'black book' or 'bluebook.' The evidence as to its authorship was that it had been written by Barbosa's wife: at the least, it was not written by any witness at trial. Barbosa claimed that he gave the information to her, and she wrote it. It is questionable whether this was even a memory refreshing document, which could have been consulted by the witness in the witness box: but that was its highest potential evidential status."

Ground 10

"There was no evidence against the appellant to establish the conduct alleged in each count, of inducing the delivery to another of anything capable of being stolen contrary to Sec 369(i) of the Criminal Code. The delivery to Barbosa of a BHC cheque did not involve 'anything capable of being stolen' within S33 (i) of the Criminal Code, see PREDDY (1996) AC 815: and R v Clark, CA, 5.4.01 [2001] EWCA Crim. 884."

It should be noted that the appellant had withdrawn grounds 3, 12 and 14.

13. **The complaint in Ground 1** relates to the acceptance of two jurors, whose impartiality was questionable. We, allowed arguments in respect of only one of those jurors: Mr. Gerald Simons. He admitted, before being sworn as a juror, to being the half-brother of a witness for the prosecution: Ms. Valerie Dill. More importantly, that witness was the Chairman of the Board of the virtual complainant: Bermuda Housing Corporation (BHC).

14. The essence of this complaint is easier understood by reference to the transcript of the proceedings, at the time Mr. Simons was called. The following is a record of what transpired:

THE COURT:	Mr. Simons do you know any of the witnesses?
MR. SIMONS:	A number of them. Robert Clifford, Valerie Dill, Thelma Trott, Mark Henneberger, and a few others I suspect, but I am not sure.
THE COURT:	I got as far as Robert Clifford, Valerie Dill?
MR. SIMONS:	Thalma Trott. And Mark Henneberger casually. I've done business with them.
THE COURT:	Yes. Gentlemen do I need to ask you about these various witnesses?
MR. RATNESSER:	I don't know—how he knows them. I mean if it's just business relationship, I don't think it really matters, maybe you can…….
THE COURT:	All right. Begin with Robert Clifford, how well do you know him?
MR. SIMONS:	Casually, for a number of years, in various businesses. The witness I know best is Valerie Dill, my half-sister. I know her very well.
THE COURT:	And I think you said Thelma Trott.
MR. SIMONS:	Thelma Trott, I saw her just the other day. I worked with her; I would have trained her, years ago. I see her, as it happens, regularly, because she lives in my neighbourhood. And Mark Henneberger I don't know very well. I'm doing business with him.
THE COURT:	Yes. Is it just those four…
MR. SIMONS:	Yes.
THE COURT:	…Are there others?
MR. SIMONS:	The others, Sonia Baptiste, been at her house y ears ago, but I mean just a casual relationship.
THE COURT:	Yes.
MR. SIMONS:	And I don't know if the Andre Simons is my cousin or not, but he is a distant cousin; I don't know him well, so….
THE COURT:	So could be a distant cousin, but…
MR. SIMONS:	But it wouldn't …it wouldn't affect my judgment.
THE COURT:	In respect of Valerie Dill, your half-sister who you know very well will that affect your judgment in respect of her….
MR. SIMONS:	Don't know. Depends on the day, I guess. I honestly don't know, your Honour.

THE COURT: Yes.

MR. SMONS: I mean, I recognise…I'm aware of her role, I know she was the Chairman of the Housing Corporation. I've discussed the issue with her casually on the street over the years, but nothing…nothing in detail, she won't give me any details, but…So, I've sympathised with her over her plight, and I'll sympathise with her more over this trial…Whether that will affect my judgment, I honestly cannot say.

THE COURT: Yes. Fair enough.

Mr. Ratnesser, do you want to ask any questions?

MR. RATNESSER: Not really, my Lord, no.

THE COURT: Mr. Scott, do you want? Mr. Simons, if you'd sit down just for a moment.

MR. RATNESSER: My Lord, I can't see any problem with this man. Ms. Valerie Dill was Chairman of the BHC, that's true, and she is going to be… She's more a formal witness than anything else, because of that I do not think a question about credibility comes into issue in this case at all.

THE COURT: Yes.

MR. RATNESSER: And the others, my Lord, they're all, as I said; they are all of peripheral reference really. One of them is the Registrar of Architects, speaks to registration of this. ...Mr. Terrence Smith. I really don't see this juror has … having any serious problems in respect of credibility of witnesses.

THE COURT: Yes. Mr. Scott

MR. SCOTT: Similarly, my Lord, Ms. Dill's evidence is really very, very formal in this matter and I don't…..

MR. RATNESSER: You know Ms. Dill too.

MR. SCOTT: In fact, I know her too. It's Bermuda. And so I don't see that affecting the juror in any way at all.

THE COURT: Yes. Thank you.

MR. SCOTT: Yes. And from his response, which was the other one I think he said that, I don't think that's a (indiscernible). So I am happy my Lord.

Thereafter, the juror was duly sworn without any objection from either Mr. Ratnesser for the Crown or Mr. Scott for the appellant.

15. Mr. O'Connor has contended that when the relationship of the juror to the chairman of the Corporation (which is the virtual complainant) is considered, coupled with the answers he gave when questioned, it shows that there was a

real possibility of bias on the part of that juror. He maintained that in those circumstances the fundamental right of the appellant to *a fair hearing before an independent and impartial court* was breached. He relied heavily on the juror's family relationship to a witness, whose position within the defrauded corporation also placed her as a victim of the fraud. A brother would, in normal circumstance, be in sympathy with a sister who heads a defrauded corporation. Mr. O'Connor maintained that it was not a case of implying what was the effect on the juror in the particular circumstances, but pointed to the specific words of the juror, which expressed sympathy for his sister.

16. The constitutional right to a fair hearing before an independent and impartial court, which the appellant seeks to invoke, is an inherent and fundamental right to which every person charged with a criminal offence is entitled. It is a cardinal rule of our justice system, which guarantees the protection of law to every human being. Indeed, public confidence in the integrity of the system depends on its reputation for independence and impartiality. That public confidence will no doubt be shaken if any tribunal that is *not fair, not independent* and *not impartial* tries the citizen. A tribunal which is biased, or one which even has the appearance of bias will cause an erosion of public confidence in the integrity of the system.

17. Lord Bingham of Cornhill, speaking of the English jury system, said the following words which are equally applicable to the system in this Island:

> *"Thus, very detailed rules have been made governing the qualification and disqualification of jurors; the manner of selection; the right of the Crown and the defence to challenge individual jurors, or the array; the procedural conduct of the trial; the evidence which the jury may be permitted to hear and the evidence which it may not be permitted to hear; the terms in which the judge should (and should not) direct the jury on the law and the facts; the protection of the jury against exposure to extraneous materials which might sway its judgment; the conduct of jurors in and out of court, and even in the retiring room; the cloak of secrecy thrown over the jury's deliberation; the absolution of the jury from the duty binding on almost (SIC) other judicial decision makers, to give reasons; the immunity of jurors from all personal liability for their decisions. Most of these rules reflect a familiar truth that if its' metal be flawed a bell will not ring true. It is of the utmost importance that juries should ring true, and be generally recognized to do so."*

18. We ask the question: Did the presence of Mr. Simons on this jury prevent it from '*ringing true*'? Since the words of Lord Hewart were uttered in the case of ***R v Sussex Justices Ex p McCarthy*** in 1924, they have stood fast throughout the years and still hold good to the present time. He said:

"…it is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done."

19. In the context of the instant case, like in so many cases, it is difficult to conclude that actual bias resulted in justice not being done. It is therefore, on the second limb of Lord Hewart's dicta that Mr. O'Connor, QC, has built his complaint. There have been many cases dealing with the proper test to be applied in determining the question of bias, culminating in the case of ***Porter v Magill*** *(2001) UKHL 67, [2002] 2 AC 357 para 103*. There, the accepted test is administrated as follows:

"Whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".[emphasis added]

Before that case, in ***R v Barnsley Licensing Justices, Ex p Barnsley and District Licenced Victuallers' Association*** [1960] 2 QB 167, 187, Devlin LJ recognised that *"bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so."* Ld. Denning MR. also, in the case of ***Metropolitan Properties Co. (FGC) LTD v Lannon*** *[1969] QB 577, 599*, expressed similar words as to the test of bias. He stated:

"The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, that there was a real likelihood of bias on his part, then he should not sit and if he does sit, his decision cannot stand… "

20. When we consider the circumstances surrounding the acceptance of Mr. Simons on the jury, we find that they demonstrate a good example of someone who should never have been sworn to deliberate on the merits of the issues advanced in the case in question. It is now accepted that even in the case of persons who express certainty that in spite of their knowledge, relationship and connection to one side or the other, that they would not be consciously bias, there is still the risk that unconsciously they may act with bias in determining the issues. [See the case of ***R v Barnsley Licensing Justices Ex p Barnsley and District Licenced Victuallers' Association*** *(supra)*]. Mr. Simons expressed sympathy for his sister because of her position as chairman of the BHC Board, and the obvious pressure the fraud on the Corporation has caused her. Certainly, a conviction of someone connected with that fraud would go a long way in easing her burden. But, Mr. Simons didn't leave the court, to make a reasonable assumption that he may react with sympathy for the complainant and prejudice against the accused/appellant. He expressly

informed the court that he could not honestly say, that the sympathy he had for his sister would not affect him in his deliberations. We are of the view, that such utterance, as candid as they were, would lead a far-minded and well-informed observer to the conclusion that there was a real possibility of bias on the part of Mr. Simons.

21. The Crown, per Mr. Ratnesser made two points in relation to this issue:

(i) The appellant was not tried by a "one man tribunal" but by a jury of 12 persons. In addition, most of the verdicts were unanimous, and even those that were not had a majority of at least ten persons.

(ii) The defence did not object to Mr. Simons serving as a juror. And more importantly, counsel for the defence stated that he was quite happy for Mr. Simons to serve.

22. No authorities have been cited in relation to point (i) in paragraph 22 above. It is significant to note, however, that in the ***Abdroikov case*** (supra) where there were three consolidated appeals, two were allowed. There was in each case, only one juror against whom possible bias was alleged. The presence of a single potentially bias juror in the deliberations of the jury clearly cast doubt on the integrity of its decision, given the inability to determine what influences that particular juror may have had on the other jurors. In this case, Mr. Simons served as the foreman of the jury. As such, he could have exercised great influence, even unknowingly, on the jury. Could Mr. Simons' presence on the jury lead a fair-minded and informed observer to conclude that there was a real possibility of bias in him, which could also have influenced his fellow jurors? We think the answer is clearly in the affirmative.

23. In relation to point (ii) in paragraph 22, the question to be answered is whether the defence counsel's acceptance of the Mr. Simons as a juror can justifiably deprive the appellant of his *right to a trial by an independent and impartial tribunal*. The provision of ***Article 6(1) of the Constitution*** is for the protection of the citizen's right, which the courts are obliged to uphold. In those circumstances, it is for the learned trial judge, in his supervisory role, to ensure that the person charged receives a fair hearing. Mr. Simons informed the court of his connection to an important witness in the case. He told the court that he could not honestly say that his connection with that witness and his knowledge of the allegations against the appellant would not affect his adjudication in the case. In those circumstances it was for the learned judge to satisfy himself, in spite of the lack of objection by counsel, that such a person, like Mr. Simons should be allowed to sit on the jury, given the principles expressed in ***Porter v Magill*** (supra). The learned judge obviously addressed his mind only to the formal nature of the evidence to be given by the witness

24. In our view, the issue of whether the appellant was *tried by an independent and impartial jury* cannot be determined on the basis that counsel for the defence did not object. It must rest on whether or not sufficient evidence had been revealed to demonstrate that a fair-minded and well-informed observer would conclude that there was real possibility of bias. The evidence in relation to that was overwhelming and consequently, we are compelled to hold that even without objection by the parties, the learned judge, in the interest of justice, and in his supervisory role, ought to have disqualified Mr. Simons from the jury. We are constrained to find that the appellant's right under ***Article 6 (1) of the Constitution*** has been breached, resulting in a miscarriage of justice.

25. We cannot, however, leave this issue without expressing our disapproval of defence counsel's consent to such a juror being sworn to sit in judgment on his client, given all the circumstances. We expect counsel to be more vigilant in the exercise of their function to protect their clients' interests. We also caution judges to bring their own assessment to situations such as existed in this case, in determining the suitability of potential jurors to sit on cases. Judges ought not depend entirely on the decisions of counsel. When there are clear reasons for disqualifying a prospective juror, judges ought not rely entirely on the acts or omissions of counsel. Indeed it is not unknown for some counsel to sit back and allow errors to go uncorrected, only to thereafter use those errors as bases for appeals. Judges must be vigilant and must guard jealously the conduct of proceedings.

26. Our conclusion in relation to Ground 1 mandates that the appeal be allowed, the convictions quashed and the sentences set aside. There is therefore no need to consider, in detail, the other two grounds, except to say the following: In relation to Ground 4, the content of the 'Blue Book' was wrongly admitted into evidence. We reject the Crown's submission that it was admissible under ***section 43 of the Evidence Act***, if for no other reason but that the illegal transaction in pursuance of the commission of a criminal offence cannot constitute a "trade or business" as contemplated by the Act. If, however, the results of the appeal depended on the outcome of this ground, we would have been prepared to apply the proviso, given the other overwhelming evidence against the appellant.

27. In support of Ground 10 the appellant relied heavily on the case of ***Regina v Preddy [1966] 3WLR 255***. In that case, the appellants were charged with

obtaining or attempting to obtain property by deception, contrary to ***section 15 (1) of the Theft Act 1968***, and were convicted. ***Section 15 (i)*** reads:

> *"A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall on conviction on indictment be liable for a term of imprisonment not exceeding 10 years. (2) For purposes of this section a person is to be treated as obtaining property if he obtains ownership, possession or control of it, and 'obtain' includes obtaining for another or enabling another to obtain or retain... ."*

28. This case concerned telegraphic and electronic transfers from one bank to another as a result of the alleged deception. However, the court took time out to consider what the legal position would be in circumstances where it was a cheque that was paid as a result of the deception. It held that where the payment was made by cheque the chose in action represented by the cheque never belonged to the drawer but came into existence belonging to the payee and so no "property belonging to another" could be obtained by the payee within ***section 15 (1)***.

29. The following dicta of Lord Golf, who delivered the judgment of the House of Lords provides an explanation at page 265:

> *"Start with the time when the cheque form is simply a piece of paper in the possession of the drawer. He makes out a cheque in favour of the payee, and delivers it to him. The cheque then constitutes a chose in action of the payee, which he can enforce against the drawer. At that time, therefore, the cheque constitutes "property" of the payee within Sec 4 (1) of the Act of 1968. Accordingly, if the cheque is then obtained by deception by a third party from the payee, the third party may be guilty of obtaining property by deception contrary to Sec. 15 (1).*
>
> *But if the payee himself obtained the cheque from the drawer by deception, different circumstances apply. That is because, when the payee so obtained the cheque, there was no chose in action belonging to the drawer which could be the subject of a charge of obtaining property by deception."*

30. In the instant case, the wording of the Bermudian Statute is different. **Section 369 (1) of the Offences Relating to Property and Contract** reads:-

> *"Any person who by any false pretence, and with interest to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of*

being stolen, is guilty of a felony, and is liable to imprisonment for seven years."

31. The notable difference between the two statutes is that the English statute speaks to obtaining "property belonging to another", whereas the Bermudian statute addresses (specifically in relation to the second part of *Sec. 369 (1)* under which the appellant was charged,) delivery to any person of "anything capable of being stolen".

32. ***Sec 331 (1)*** of the Bermudian Act (ie Offences Relating to Property and Contracts) defines "things capable of being stolen *inter alia* as:

"Every inanimate thing whatsoever which is the property of any person, and which is movable, is capable of being stolen."

It seems to us that a cheque meets the definition (stated in *section 331 (1))* of things capable of being stolen and creates a significant distinction between the English and the Bermudian Statute. We note with interest the reference to the Australian case of ***Parsons*** *[1998] 2 VR 478* in the case of ***R v Brian James Hemmings Clarke*** *(2001) EWCA 884* and the refusal of the Supreme Court of Victoria to follow the decision in ***Preddy*** (supra) on the grounds that the decision in relation to cheques was obiter. Reference is also made to the strong criticism of Professor John Smith's (In (1997) Crim Law Review 386) of the reasoning (in ***Preddy***) based on the notion that a cheque is not a form of physical property.

33. The Australian case of ***Parsons v R*** *(1999) 73 ALJR 270 (1999) HCA* was decided in relation to the provisions of ***section 81 of the Crimes Act*** which in its terms is almost identical to the English Act. The dicta in that case, however, stressed greatly the provisions of the ***Cheque Act 1986*** which took it outside of the ambit of the reasoning in the ***Preddy*** case (supra).

34. For our purposes, however it is sufficient to distinguish the ***Preddy*** case from the instant appeal on the basis that the Bermudian statute requires only that the property obtained by means of the false pretence, is property capable of being stolen. The definition of "things capable of being stolen" makes it clear that a cheque, being an inanimate thing, which is moveable, is indeed a thing capable of being stolen.

35. The indictment alleges in each count that the appellant by false pretences etc. -------- induced BHC to deliver to Steven Barbosa a BHC cheque number (gives the numbers in respect of each count) in the amount of (states the amount) with intent thereby to defraud. The cheques were written up in the name of Barbosa, a third party and handed to him. We conclude that that was sufficient to satisfy the provisions of the Bermudian statute. In any event, the cheque, being something capable of being stolen was, as a result of the false pretence, handed to Barbosa. We are prepared to find, and so do that the

cheque form was something of value and capable of being stolen and for those reasons, this ground cannot succeed.

36. Having quashed the convictions and set aside the sentences, we are left only to determine what other order should be made. Mr. O'Connor, QC, opposes the ordering of a new trial, having regard to the time when the offences were committed (over the period September 2000 to February 2002) and conviction (March 2006). Also, because the appellant has already served the greater part of his sentence. Having been of good behaviour, he comes up for parole next year (2008). We note, however, that these factors cannot be considered in isolation. The appellant's failure to prosecute his appeal, for reason already set out in this judgment must also be taken into account.

37. Given the strength of the Crown's case, we are not disposed to entering verdicts of acquittal. In the interest of justice, given all the surrounding circumstances, the remaining appropriate order can only be for a new trial. Therefore the orders of the court are that the convictions be quashed, the sentences set aside and in the interest of justice, a new trial ordered.

I agree _____Signed_____

Nazareth, JA

I also agree

_____Signed_____

Evans, JA

_____Signed_____