

**COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
Sup. Ct. Cr. App. No. 28 of 2003**

DENNIS JOSEPH SUTTON

Appellant

V

R E G I N A

Respondent

**Before: The Rt. Hon. Mrs Justice Sawyer, President
 The Honourable Mr Justice Ganpatsingh, J.A.
 The Honourable Mr Justice Osadebay, J.A.**

**Appearances: Mr T.A.E. Evans, Q.C., Mr K. Toppin with him for
 the Appellant**

**Mr Gaskin, Ms Kenrah Francis and Mr Edmund
Turner with him for the Respondent**

Dates: 22 July 2004; 27 September, 2004

J U D G M E N T

The Judgment of the court was delivered by Sawyer, P.

1. At the close of the hearing, we allowed the appellant's appeal, quashed the conviction and set aside the sentence. At that time we promised to give our reasons in writing later for so doing; this we now do.

2. The background to the appeal is as follows:

3. The prosecution charged the appellant with sixty-eight counts of forgery and uttering, contrary to sections 389 and 396, respectively, of the Penal Code (Ch.77).

4. Those counts related to seventeen International Business Companies ("IBCs") whose documents of incorporation were prepared and presented to the Registry of Records by or on behalf of International Investors Group, an IBC of which the appellant was the principal. The prosecution chose to make four separate counts in respect of each of the seventeen companies – one count in respect of the alleged forgery of the Memorandum of Association of each IBC, one in respect of the alleged forgery of the Articles of Association of

each IBC, and one count each in respect of the alleged uttering of the respective Memorandum and Articles of Association.

5. Two examples of the counts as they were in the indictment at the beginning of the trial before Isaacs J and a jury and at the close of the case for the prosecution are set out here for ease of reference:

“Statement of Offence

Forgery, contrary to section 389 of the Penal Code, Chapter 77.

Particulars of Offence

That you, Dennis Sutton, on or about Tuesday, 9th January, 1998, at New Providence, with intent to defraud, forged a certain document, to wit: a Memorandum of Association of Pentegram Corporation in the name of Donna M. Harding-Lee, purporting the same to be genuine.”

“Statement of Offence

Uttering a forged document, contrary to Section 396 of the Penal Code, Chapter 77.

Particulars of Offence

That you, Dennis Sutton on or about Friday, 12th January, 1998, at New Providence, with intent to defraud, uttered a certain forged document, to wit: Memorandum of Association of Pentegram Corporation in the name of Donna M. Harding-Lee, knowing the same to be forged.”

6. From a careful reading of the verbatim transcript of the evidence in the case, the factual background was as follows:

7. The appellant was the principal shareholder of International Investors Group, (“IIG”) an International Business Company registered in the Registry of Records of The Bahamas under the International Business Companies Act, 1989 (No. 2 of 1990) (“the 1989 Act”).

8. At the time of the alleged offences and his arrest, the appellant’s office was situate at No. 328 Bay Street, Nassau. He employed a number of staff, all of whom were arrested along with the appellant on 8 January 2001 and most of whom were called as prosecution witnesses at the trial.

9. Those witnesses gave evidence of the preparation of Memoranda and Articles of Association for the seventeen International Business Companies, among others, that had been registered under the 1989 Act by IIG in fact but by two different law firms in appearance. Those witnesses testified that those documents were prepared on the appellant’s instructions and that the names and addresses of the respective registered agents and registered offices were inserted from an informal list they kept in their office as well as the appellant’s instructions from time to time.

10. Section 39 of the 1989 Act, required each International Business Company (“IBC”) to have a “registered agent” and a “registered office”, neither of which could be another IBC so that in doing what they did, the employees and the appellant as well as any lawyers who allowed their names or the names of their law firms to be used to give colour of legality to the various memoranda and articles

of association, were acting in breach of the 1989 Act – either as perpetrators or as accomplices. In effect, they appeared to have acted in concert to evade the requirements of section 39 of the 1989 Act. But that was not the offence alleged in any of the counts in the indictment.

11. In each Memorandum and Articles of Association prepared by the staff of IIG, the name of a lawyer or law firm was inserted in order to give the appearance of compliance with the requirements of the 1989 Act.

12. Two of the prosecution witnesses – Mrs Rolle-Pratt and Ms Nairn – also testified about how payments were made to various lawyers or law firms for the use of their names as registered office and registered agent of the IBCs which were in fact incorporated by IIG.

13. The sequence of events generally was that the appellant would instruct his staff to incorporate an IBC; the staff would prepare the necessary documents – which were apparently computerised pro forma documents – by inserting the names and other relevant data in them. The names of the registered agent, registered office of each IBC was apparently selected from the informal list mentioned above or as instructed by the appellant. Each lawyer/law firm on that list was paid an agreed sum of \$300.00 per IBC upon incorporation and an annual sum for maintenance.

14. Also according to Mrs Rolle-Pratt and Ms Nairn, the names of Mrs McCartney-Pedroche and Mrs Harding-Lee were on that list.

15. Mrs. Rolle-Pratt and Ms Nairn also testified that the appellant had introduced Mrs Harding-Lee to them in December, 1997 and had told them, in Mrs Harding-Lee's presence, that they would also be using her law firm as a registered agent/registered office for IBCs from then on.

16. Mrs McCartney-Pedroche and Mrs Harding-Lee denied that the kind of meeting in which such an arrangement could have been made between the appellant and Mrs Harding-Lee took place on that occasion. This therefore raised a serious conflict in the evidence for the prosecution as to whether a material element in the charge of forgery – lack of consent - was shown in respect of the fifteen IBCs which contained Mrs Harding-Lee's name.

17. With regard to the eight counts of forgery in respect of the memorandum and articles of association of two IBCs which bore the name of Mrs McCartney-Pedroche as registered agent/registered office, Mrs McCartney-Pedroche admitted that she had an arrangement with the appellant which allowed him to use the name of her law firm as registered office, registered agent in the incorporating documents for IBCs incorporated by IIG, and she also gave the appellant some of her distinctive covers to be used for that purpose. Mrs McCartney-Pedroche also admitted that she had in fact been paid the agreed price except in respect of the two IBCs which were the subject of eight of the counts in the indictment.

18. Mrs McCartney-Pedroche did say, however, that she had not given the appellant “carte blanche” to use the name of her law firm for the purpose of incorporating IBCs and that she was supposed to be consulted prior to the submission of the documents to the Registry of Records. From the documentary evidence in the case, however, it appears that Mrs McCartney-Pedroche’s request for prior sight of the documents was only made in 1999; more than two years after her arrangement with the appellant had taken effect.

19. It was clear from Mrs McCartney-Pedroche’s evidence that she had in fact given her consent for the use of the name of her law firm so that the insertion of the name of her law firm in the documents of incorporation could not have been “without her consent” as required by section 70 of the Penal Code in order to ground a charge of forgery.

20. Mrs Harding-Lee, on the other hand, never admitted to having any such arrangement with the appellant. She did, however, admit to having received the documents of incorporation for two IBCs from the Registry in early 1998 and also receiving a cheque for \$600.00 from an unknown source with the names of those two IBCs on it. Those documents referred to two of the IBCs which form the basis of the charges against the appellant. Although she said she did not know the source of that cheque or the documents of incorporation, Mrs Harding-Lee, following her general policy, caused that cheque to be deposited to her client’s account. There seemed to have been some dispute as to whether that cheque was honoured. As that

cheque was never returned to the appellant or IIG, the question arose as to whether or not the appellant, as the brain of IIG, reasonably believed that the arrangement to use Mrs Harding-Lee's law firm as registered agent, registered office for IBCs was in place since that cheque was never returned to the bank on which it was drawn for transmission to the person or company that drew it.

21. While that may have been a case of misjudgement or inadvertence on Mrs Harding-Lee's part, she later received another cheque – this time with the identity of the drawer on it – IIG – for \$900.00. Mrs Harding-Lee, following her practice, also caused that cheque to be deposited to her client's account, even though, according to her testimony, she had made no arrangement with the appellant or IIG to use the name of her law firm as registered agent or registered office for any IBC incorporated by IIG, nor, apparently, had she seen the documents of incorporation for the three IBCs which the \$900.00 represented.

22. Mrs Harding-Lee only admitted exchanging business cards with the appellant on an occasion in late 1997 when she was introduced to the appellant by Mrs McCartney-Pedroche. Mrs Harding Lee's memory of that occasion was that there may have been a Christmas party going on at the time. She did not recall ever being left alone with the appellant to discuss any business.

23. The then Registrar General contacted Mrs Harding-Lee about Pentegram Corporation – the IBC to which the first four counts in the indictment relate. Mrs Harding-Lee apparently denied any knowledge

of its existence or how her name came to be written into its documents of incorporation. We say that because it appears that it was around that time that the investigation of IIG began. Mrs Harding-Lee further explained that the form in which her name appears in the documents presented to the Registrar General for registration by IIG, is not the form she uses for her business.

24. Such was the state of the evidence at the close of the case for the prosecution.

25. Mr Evans, who appeared for the appellant in the court below, made a submission of no case to answer in accordance with the second principle laid down in Galbraith [1981] 1 WLR 1039, 73 Cr. App. R. 124 and applied to The Bahamas by this court in Larry Raymond Jones v Regina (Cr App No. 7 of 1988)(unreported). The learned trial judge rejected that submission.

26. The appellant's first ground of appeal is that the learned judge erred in law in rejecting the submission of no case to answer. We considered that ground meritorious for the following reasons:

27. Although the charges of forgery were laid contrary to section 389 of the Penal Code, it is section 70 of the Penal Code which defines forgery. That section, so far as material, reads –

“70. The following provisions apply with respect to forgery, namely –

(1) a person forges a document if he makes or alters the document, or any material part

thereof, with intent to cause it to be believed either –

- (a) that the document or part has been so made or altered by any person who did not in fact so make or alter it; or
 - (b) that the document or part has been so made or altered with the authority or consent of any person who did not in fact give such authority or consent; ...
- (6) every word, letter, figure, mark, seal, or thing expressed on or in a document, or forming part thereof or attached thereto, and any colouring, shape or device used therein, which purports to indicate the person by whom, or with whose authority, or consent, a document or part thereof has been made, altered, executed, delivered, attested, verified, certified or issued, or which may affect the purport, operation or the validity of the document in any material particular, is a material part of the document.”

28. Section 17 of the Penal Code provides that -

“17. For the purpose of any provision of this Code by which any forgery, falsification or other unlawful act is punishable if used or done with intent to defraud, an intent to defraud means an intent to cause, by means of such forgery, falsification or other unlawful act, any gain capable of being measured in money, or the possibility of any such

gain, to any person at the expense or to the loss of any other person.” (Emphasis supplied)

29. At the close of the prosecution’s case, the undisputed evidence for the prosecution as far as the counts relating to Mrs McCartney-Pedroche were concerned, showed that she had in fact authorised the appellant to use not only her firm’s name and address but also had presented the appellant with her firm’s distinctive covers and that she had in fact been paid by him for all but two of the IBCs, so there could have been no evidence of actual forgery nor of any intention to defraud even if there was a comparatively small sum due to Mrs McCartney-Pedroche for one or more of the IBCs whose documents bore the name of her firm.

30. Mr Gaskin argued that since IIG/appellant had not in fact paid Mrs McCartney-Pedroche for those two IBCs, there was evidence that he intended to cause a loss to her by inserting the name of her firm in the documents for those IBCs.

31. In our judgment, that proposition ignores the undisputed fact that Mrs McCartney-Pedroche had in fact given her consent so there was no issue as to whether the documents were forged. Consequently, there could have been no issue as to whether there was an intention on the part of the appellant to defraud Mrs McCartney-Pedroche. In addition, at that stage in the proceedings, there was not a single count in the indictment which alleged that the appellant intended to defraud any particular person.

32. Arguably, Mrs McCartney-Pedroche may have had a civil cause of action against IIG and/or the appellant but there was no evidence that any crime had been committed by anyone of which Mrs McCartney-Pedroche could be said to be the victim not only because she was a willing participant in the arrangement with the appellant but because she had, both by word and conduct, induced in the mind of the appellant that she was willing to do business in the manner described in paragraphs 16 and 17 above. It follows that in the words of Lord Lane CJ in Galbraith's case cited above, "**there was no evidence that the crime alleged** [in respect of Mrs McCartney-Pedroche] **had been committed by the defendant**" and the learned judge ought to have stopped the case insofar as it related to the eight counts which related to Mrs McCartney-Pedroche.

33. Mr Gaskin urged this court to find that at the close of the case for the prosecution, there was evidence fit to be considered by the jury under the second of the Galbraith principles since Mrs Harding-Lee had categorically denied that she had made any agreement with the appellant to act as a registered agent and registered office for IBCs created by the appellant. It was, he submitted, a question of fact to be decided by the tribunal of fact as to who they believed – Mrs Harding-Lee or the appellant and the two witnesses for the prosecution – Mrs Rolle-Pratt and Ms Nairn – each of whom, had an interest to serve by giving their evidence in the manner that they did.

34. In Galbraith's case cited above, at page 1042 B-D, Lord Lane CJ, in giving the judgment of the Court of Appeal in England said –

“How then should the judge approach a submission of ‘no case’? ...(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness’s reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury...” (Emphasis added)

35. At the close of the case for the prosecution, the only dispute was whether or not there was an agreement between the appellant and Mrs Harding-Lee for IIG/appellant to use her law firm as a registered agent/registered office for IBCs incorporated and managed by IIG, subject to the payment of the standard fees. In that regard, there was an inherent conflict in the evidence for the prosecution on that issue. In addition, there was the evidence of Mrs Harding-Lee herself that she had received two sets of documents in January 1998 from the Registry of Records for two IBCs which she had not herself incorporated but which bore her name in an unusual style but which she did not return to that Registry although she said she kept those documents in her “out” tray for about two years.

36. Around the same time, Mrs Harding-Lee received a “counter-cheque” with the names of those two IBCs on it in the sum of \$600.00. While that cheque did not have the name of the appellant or IIG on it, it must have had the bank’s name and an account number for Mrs Harding-Lee caused it to be deposited to her client’s account. While Mrs Harding-Lee said that that cheque was dishonoured, another prosecution witness said that it was re-presented to the bank and honoured.

37. Later on, Mrs Harding-Lee received a cheque from IIG for \$900.00 which, like the cheque for \$600.00, she caused to be deposited to her client’s account. She had done no work for which that cheque could have been a payment, yet she accepted payment from an entity she said she had no arrangement with. The inconsistencies in the prosecution’s case at the close of their case were such that, in our judgment, no reasonable jury, properly instructed on the law regarding the actus reus and mens rea of the offences alleged in the indictment, could reasonably have been expected to convict, since the jury would have had to be directed that there was evidence of conduct by Mrs Harding-Lee which would have lead a reasonable person – which the appellant is presumed to be – to believe that his understanding that there was an agreement between himself and Mrs Harding-Lee was, on a balance of probabilities, correct. The jury would therefore have had to be instructed that there was no credible evidence that the appellant forged Mrs Harding-Lee’s name on any of the documents of any of the fifteen IBC’s or that he had any intention to defraud her since he

had paid (or caused to be paid) the usual sums to her before he visited her office and decided not to use her office any more.

38. Furthermore, just as in the case of Mrs McCartney-Pedroche, so in the case of Mrs Harding-Lee; there was not a single count in the indictment at that stage which alleged that the appellant had intended to defraud any particular person or group of persons.

39. For those reasons we allowed the appeal without considering any of the other grounds set out in the notice of appeal.

40. Before leaving this judgment we wish to add what we indicated to Mr Gaskin during the course of the hearing.

41. It was simply this: great care must be exercised in the investigation and charging of alleged offences of fraud. In this particular case, it was arguable that the evidence may have supported the much less serious offences under the 1989 Act or the offence of “deceit of a public officer” contrary to what is now section 243(summary) or 432 (indictable) of the Penal Code, it did not support charges of forgery and uttering.

J. A. Sawyer,
P.

