

**IN THE SUPREME COURT OF GRENADA
AND IN THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CRIMINAL)**

GRENADA

CASE NO. GDAHCR2020/0038

BETWEEN:

THE KING

And

ALSTON ALEXANDER

MARCIA ANN CHARLES WATSON

Appearances:

Ms. Crisan Greenidge, Senior Crown Counsel for the Crown

Mr. Cajetan Hood of Counsel for the 1st Defendant

Mr. Francis Paul of Counsel for the 2nd Defendant

2024: June 18;
November 28

Defrauding by false pretences – Motion to quash indictment on grounds that indictment discloses no offence known to law – Goods sold according to weight thereby affecting value – Whether false representation as to weight/value constitutes an offence in law when goods sold at a price higher in value – Failure to provide particulars of offence – Whether offence known to law disclosed without such particulars – Whether infringement of fundamental right to protection of the law to charge offence unknown to law

Whether indictment bad in law by not disclosing any criminal offence known to law and therefore a nullity – Whether indictment merely defective and such defect could be cured by furnishing particulars or by amendment

Whether failure to include particulars results in indictment being bad in law – Whether right to obtain particulars of charge in indictment entrenched – Constitutional right to be discharged when charged with offence not criminal when it occurs – Whether fundamental right not be arraigned on defective indictment

JUDGMENT

- [1] **INNOCENT, J.:** Before dealing with the substantive application before the court it will be necessary to chronicle part of the procedural history in this matter for the purpose of giving context to the application presently before the court.
- [2] The defendants were jointly indicted on 13th January 2022 on nine (9) counts of defrauding the Government of Grenada for various sums of money by false pretense contrary to section 279 of the Criminal Code.¹ The said offences were said to have been committed between the following periods: between 1st January and 31st December 2009; between 1st and 31st December 2010; between 1st January and 31st December 2011; between 1st January and 31st December 2012; between 1st January and 31st December 2013; between 1st January and 31st December 2014; between 10th January and 20th March 2015; between 5th January and 22nd March 2015; and between 1st January 2009 and 22nd March 2015.
- [3] The defendants were also charged with seven (7) counts of Money Laundering contrary to sections 2(1) (b), 3(1) and 5 of the Money Laundering (Prevention) Act 1999. The dates that the money laundering offences were alleged to have occurred coincide with the dates that the defrauding by false pretences offences are alleged to have occurred.
- [4] On 18th March 2022 Counsel appearing for both defendants raised certain technical preliminary legal points before Her Ladyship the Honourable Justice Victoria Charles Clarke ('Justice Charles-Clarke') pertaining to the counts of defrauding by false pretenses laid in the initial indictment. These preliminary points pertained to the interpretation and application of the provisions of sections 279, 38 and 39 of the Criminal Code. In a nutshell, the defendants had argued that the indictment was defective in that it did not disclose the commission of any offence known to law to the extent that the prosecution had failed to include an essential element of the

¹ Cap. 1 Vol. 1 of the 1994 Continuous Revised Edition of the Laws of Grenada

offence which in any event was not disclosed in the facts upon which the prosecution relied.

- [5] The pith and gravamen of the defendants' submission on the preliminary points raised before the previous trial judge can be summarised as follows: that the complainant's consent was not obtained by false pretences; that an essential element of the offence was obtaining consent by false pretences; that false pretences involved the representation concerning the state of facts about something; that false representation as to the quality or value of a thing can only arise if the thing proves to be substantially worthless for the purpose represented; and that the requirement relative to consent contained in section 39(2) (c) of the Criminal Code had not been satisfied.
- [6] In answer to the preliminary points raised by the defendants, the prosecution held the position that on the facts relied on the elements of the offence had been made out and therefore, the indictment was not defective to the extent that it disclosed no offence known to law.
- [7] The factual contentions relied on by the prosecution in support of their case can be summarised in the following manner. The prosecution alleged that during the period January 2009 to March 2015, the defendants had pursuant to an agreement with the Royal Grenada Police Force ('RGPF') supplied chicken to Camp Salines and Camp Raymond. On each occasion that the defendants made a delivery they presented an invoice for payment for the quantity stated on the invoice. In 2019 an audit was conducted and it was discovered that the quantity supplied by the defendants was not commensurate with or was less than the quantity stated on the invoices produced by the defendants.
- [8] In fine, the prosecution's case was that on each occasion that the defendants made delivery they presented an invoice and received payment for a quantity supplied which was less than that stated in their invoices. Therefore, the defendants received money in excess of the value of the product which they delivered.

- [9] The prosecution contended that consent was given by payment having been made for the quantity of product stated on the invoice produced by the defendants. According to the prosecution's case, the consent related to "quantum" which was substantially less and not to accepting a lesser "quality" or "value". In opposition to the preliminary point raised by the defendants, the prosecution took the view that the defendants were in effect falsely representing a larger quantity on their invoices in order to defraud the RGPF of more money for the actual amount of product supplied.
- [10] It is unfortunate that the court in this instance did not have the benefit of the written reasons for the decision given by Justice Charles-Clarke. However, it appears from what has been telegraphed to the court by counsel on either side that the learned judge had given an indication that the prosecution consider amending the previous indictment as it then stood. Consequently, the prosecution filed an amended indictment on 8th March 2024.
- [11] Each of the counts contained in the amended indictment related to the offence of defrauding by false pretenses, alleged that the defendants on divers occasions defrauded the Government of Grenada of various sums by "false pretence, to wit, "over invoicing" the quantity of chicken delivered by a certain quantity.
- [12] For the sake of exposition the text of one of the counts relative to the offence of defrauding by false pretence in the initial indictment is reproduced hereunder, and reads as follows:
- "Her Majesty's Director of Public Prosecutions in and for the State of Grenada, for and on behalf of Our Sovereign Lady the Queen presents that you ALSTON ALEXANDER and you ANN CHARLES WATSON both of Telescope in the Parish of Saint Andrew and State aforesaid, between Thursday the 1st day of January and Thursday the 31st day of December 2009 within the Parish of Saint George and State aforesaid did DEFRAUD the GOVERNMENT OF GRENADA of the sum of ninety thousand two hundred and sixteen dollars and fifty cents Eastern Caribbean Currency (\$90,216.50ECC) by false pretence, contrary to section 279 of the Criminal Code Cap.1 Vol.1 of the 1994 Continuous Revised Edition of the Laws of Grenada."

- [13] A sample of one of the counts in the amended indictment filed 8th March 2024 related to the offence of defrauding by false pretence reads as follows:

“His Majesty’s Director of Public Prosecutions in and for the State of Grenada, for and on behalf of Our Sovereign Lord the King presents that you ALSTON ALEXANDER and you ANN CHARLES WATSON both of Telescope in the Parish of Saint Andrew and State aforesaid, between Thursday the 1st day of January and Thursday the 31st day of December 2009 within the Parish of Saint George and State aforesaid did DEFRAUD the GOVERNMENT OF GRENADA of the sum of ninety thousand two hundred and sixteen dollars and fifty cents Eastern Caribbean Currency (\$90,216.50ECC) by false pretence, to wit; over invoicing the quantity of chicken delivered by sixteen thousand four hundred and three pounds (16,403 lbs.); contrary to section 279 of the Criminal Code Cap. 1 Vol. 1 of the 1994 continuous Revised Edition of the Laws of Grenada.”

- [14] This second indictment was also challenged by the defendants. It is this challenge which forms the subject of the current proceedings before the court. In the most recent challenge, the defendants contend that even if the facts are indeed as alleged by the prosecution, there exist no basis in law within the jurisdiction of Grenada to charge the defendants with the predicate offences and by extension the charges related to the other statutes contained in the indictment.

- [15] In essence, the defendants’ contention was that the language of the charges related to false pretences contained in the amended indictment disclosed no offence known to the laws of Grenada and by extension were contrary to the defendants’ rights guaranteed under section 8(4) of the Grenada Constitution and therefore ought to be quashed.

- [16] The issues that arise on the present application do not in the court’s humble view interrogate any question of constitutional impropriety. Therefore, the defendant’s reliance on section 8(4) of the Constitution is unfortunate. Section 8(4) provides:

“No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.”

- [17] The court agrees with the prosecution's submission that it is clear from a literal interpretation of section 8(4) that the mischief which the section seeks to address is in no way dispositive of the issues which the court has to decide in the present application. Section 8(4) simply forbids the retroactive operation of criminal statutes.
- [18] In the court's considered view, to plead to an indictment which does not disclose an offence known to law does not offend against section 8(4) of the Constitution. The defendants' contention that the particulars of the counts in an indictment which do not disclose a criminal offence known to law infringed the rights protected by section 8(4) of the Constitution is unmeritorious.
- [19] Section 8(4) of the Constitution must not be construed in a narrow or pedantic sense. The correct method of resolving its meaning is to construe it as a whole. What is protected under section 8(4) is the right not to be convicted or sentenced; but there is no right not to be charged on an ex post facto offence that was not criminal.
- [20] Although it is the common law right of a defendant to a criminal charge to make a successful no case submission at his trial that he has been charged with an offence not known to the law, he has no constitutional right not to be charged.
- [21] Therefore, the defendants have not shown that to charge them on the present indictment which they argue is defective and therefore a nullity because it discloses no offence known to the law, infringes or threatens to infringe any fundamental right guaranteed to them under the Constitution.
- [22] Distilled to its essence, the defendants' contention was that the word "over-invoicing" in the statement of particulars without more, did not amount to a criminal offence or a false pretence for the purposes of sections 279, 38 and 39 of the Criminal Code and hence was not an offence known to the law. Therefore, they argued that they had a constitutionally entrenched right not to be charged or tried on an indictment that disclosed no offence known to the law.

- [23] It seems to the court undoubtedly right that a man should not be charged for an offence unknown to the law. However, in the court's view, no constitutional infringement has been made out and also, the court's jurisdiction under section 16 of the Constitution has not been properly triggered considering that the defendants have recourse to other relief under the common law and statute.
- [24] Therefore, though it might be a common law right or one established by statute, where the existence of an offence unknown to law is established or exists, entitles a defendant to make a successful no case submission at his trial or to move a motion to quash the indictment and in arrest of judgment, it cannot be a constitutionally established right not to be charged. Nowhere in the Constitution is such a right entrenched.
- [25] In the premises, the court will confine itself purely to those issues that touch and concern the question of whether the indictment as laid is defective or that it discloses no offence known to the criminal law in Grenada. Not all common law or statutory rights have assumed the status of entrenchment. The defendants only have a common law or statutory right not to be charged with an offence unknown to the law, and this common law or statutory entitlement is not identical with and is clearly distinguishable from the constitutional right which is, that they have to be discharged when charged with an offence which was not criminal when it took place. Only the latter right is constitutionally entrenched.
- [26] Objections to a charge for an offence not criminal when it took place and an offence not known to law because of a defect or defects in particulars are based on two entirely dissimilar jurisprudential concepts. The first is constitutional while the other is not. In the first case, the right of a defendant to be found not guilty and to be discharged is entrenched constitutionally; whereas in the other, the charge being merely defective, there is no right to be discharged in the sense that he can properly plead *autrefois acquit* if the prosecution chooses to prefer another indictment against him for the same offence.

- [27] Therefore, assuming that the defendants are correct in concluding that they have been indicted for an offence unknown to law, it is certain that they cannot bring their cases within article 8 of the Constitution which ordinarily deals with the charging of criminal offences under the Laws of Grenada. The court is therefore forced to conclude that the preferment of an indictment which does not disclose an offence known to law is not a subject on which any constitutional question can arise.
- [28] Given the protections and safeguards available to the defendants under common law and statute, it would seem that the defendants have attempted to invoke the court's inherent powers under section 16 of the Constitution to either circumvent the rigours of the criminal law and thereby seeking to have the court determine a criminal matter in what ought clearly to have been civil proceedings. This is inappropriate.
- [29] In the premises, the court adopts the view that constitutional questions raised by the defendants in the present application are captured by the proviso to section 16(2) of the Constitution and accordingly, the court declines to accept that it can exercise its powers under this subsection as it is satisfied that adequate means of redress for the contravention alleged are or have been available to the defendants under other law.
- [30] The court thinks that having already embarked on a thorough discourse relative to the question of constitutional impropriety raised by the defendants, it is important to determine the question relative to the whether the indictment discloses no offence known to the law or is merely defective. If the former question is answered in the negative, the next question is whether such defect or lack of particulars contained in the indictment results in it disclosing no offence known to the law and ultimately amounts to a nullity and therefore ought to be quashed or whether such defect can be cured by amendment. The court thinks that this is the correct approach. Indeed if the first and second questions are answered in the affirmative then perhaps there may not be any need to consider the question of whether the indictment is a nullity.

- [31] In a nutshell, the defendants proffered the argument that the amended indictment is fallacious and defective to the extent that the predicate offence is not one of theft but defrauding by false pretence. The court understood this argument to mean that the indictment did not disclose the offence of defrauding by false pretence or that it did not sufficiently describe or provide particulars of the defrauding by false pretence committed; and that the charge, based on its wording, at its highest only disclosed an allegation of theft which is not the substantive offence charged.
- [32] Mr. Anthony C. K. Hood ('Mr. Hood') Counsel appearing for Mr. Alston Alexander ('Mr. Alexander') took issue with the language in which the counts relative to the charges of false pretences were framed in the amended indictment. The substance of the defendants' complaint was that in order for the defendants to be criminally liable under section 279 of the Criminal Code all of the elements of the offence must be satisfied or at the very least contained in the counts in the indictment. The pith and gravamen of Mr. Hood's argument seemed to be that the failure to state the particulars of the false pretence relied on rendered the counts defective in that they disclosed no offence known to the criminal law and were therefore defective and consequently a nullity. It was on this basis that the defendants sought to have the court quash the indictment.
- [33] In addition, Mr. Hood submitted that the amended indictment introduced language into the counts related to the offence of false pretences that was alien to the Criminal Code in substitution for the clear words of the relevant provisions of the Criminal Code. According to Mr. Hood, the impugned counts in the indictment ought to have been confined as far as possible to the clearly defined elements of the offence contained in the provisions of the Criminal Code.
- [34] It appeared that Mr. Hood's argument was that the use of the words "over-invoicing" contained in the particulars of the offence did not furnish sufficient particulars of the false pretence alleged; and that the concept of "over-invoicing" was not the act or conduct which the law criminalised. Therefore, according to the preceding argument, the counts in the indictment alleging defrauding by false pretence, which

fail to state with precision the particulars of the false pretence alleged and employing the language of “over-invoicing” meant that the indictment disclosed no offence known to the law and was therefore defective and consequently a nullity on the grounds of insufficiency or absence of adequate particulars stated therein.

[35] Relying on the provisions of sections 38 and 39 of the Criminal Code, the defendants contended that it was beyond peradventure that the recipient of the goods did give consent to the payment of the sums paid to the defendants; however, the defendants’ primary contention was that such consent was **not** obtained by a false pretence with the intent to defraud. However, Mr. Hood argued that the consent of the complainant cannot be said to have been obtained by false pretence as there was no allegation that the product supplied was unfit for the purpose for which it was intended or that it was entirely worthless.²

[36] Therefore, according to the defendants, the counts in the indictment relative to the offence of defrauding by false pretence, do not disclose the nature of the false pretence that was used to obtain the complainant’s consent and which resulted in defrauding the complainant. In fine, the defendants’ argument as the court understood it, was that the false pretence relied on by the prosecution was “over-invoicing” which in the defendants’ view did not amount to a false pretence with an intent to defraud for the purposes of sections 38 and 39 of the Criminal Code.

[37] Furthermore, the defendants argued that the prosecution has not established on the available evidence that the goods were worthless. According to the defendants this element of the offence has not been established on the evidence and to the contrary it has been accepted that the goods supplied were used or accepted as the case may be. In other words, that the complainants in this case obtained some value for their money.

[38] In this instance, the fact that the defendants received payment for the goods delivered is not disputed. However, they vehemently deny that they had any intent

² Section 39(2) (c)

to defraud or that they engaged in any false pretence with the intent to defraud. To that extent the defendants relied on the provisions of section 17 of the Criminal Code.

[39] On the basis of the definition of intent to defraud contained in section 17 of the Criminal Code, the defendants argued that the essence of fraud is the acquisition of gain which has a money value at the expense or loss of another. According to Mr. Hood, the alleged misrepresentation or false representation as to the “weight” or “quantity” of the goods supplied could only be deemed fraudulent and a charge therefor sustainable on account of the ascribed value of the gain or loss and certainly not on account of any other description of the goods in question. In the ordinary course of things this would be considered an accurate statement of the law. This argument appeared to be sustained on the basis of section 39(2) (c) of the Criminal Code which will be discussed later on in this judgment. It appears that Mr. Hood’s allusion was to the question of whether the allegation of false pretence and intent to defraud could be sustained where the representation did not concern a statement of fact relative to the condition, quality or value of the product supplied to the complainant.

[40] The prosecution’s position on the current issue was that the amended indictment in its present form was in conformity with the provisions of sections 127 to 129 of the Criminal Procedure Code (‘CPC’) and for all intents and purposes went beyond what was even required by law generally.

[41] In addition, the prosecution adopted the view that the amended indictment was quite capable of giving clear and adequate notice to the defendants of the nature of the offences with which they were charged in sufficient detail to enable them to answer the said charges. To that extent the prosecution contended that the amended indictment in its present form had not infringed the relevant provisions of the CPC.

[42] The prosecution argued that the amended indictment contained the essential factual elements of its case against the defendants namely, that the defrauding was achieved by “over-invoicing” relative to the quantity albeit weight of product

supplied. According to the prosecution, the language of which the defendants complain, is well within the ambit of what is required by section 129 of the CPC.

[43] In addition, the prosecution prayed in aid the provisions of section 133(2) of the CPC which essentially provides that subject to the proviso, a count shall not be deemed insufficient if it does not set out in detail what false pretences or what the fraud or fraudulent means consisted of.

[44] In answer to the objections raised by the defendants relative to section 279 of the Criminal Code, the prosecution alluded to the novelty of the offence as it pertains to the criminal law in Grenada. According to the prosecution the offence of defrauding by false pretences appears to be unique to Grenada and does not feature in other criminal statutes in other Commonwealth jurisdictions. The prosecution alluded to the fact that similar provisions however exist in the criminal statutes of Ghana and the Bahamas.

[45] Ms. Crisan Greenidge ('Ms. Greenidge') Senior Crown Counsel appearing on behalf of the Director of Public Prosecutions ('DPP') in these proceedings directed the court's attention to the provisions of section 348 of Penal Code of the Bahamas and section 131(1) of the Criminal Code of Ghana which she submitted were in *pari materia* with the provisions of section 279 of the Criminal Code. Ms. Greenidge also alluded to the fact that the provisions of sections 58 to 60 and 132 to 134 of the Bahamian and Ghanaian statutes respectively are in fact identical to the definition provisions of the Grenadian Criminal Code.

[46] Ms. Greenidge argued that the offence of defrauding by false pretences does not appear to have a common law origin but rather is a creature of statute unlike offences of stealing and obtaining property by false pretences.³

[47] There appeared to be no dispute between the parties as to what the constituent elements of the predicate offence were. It was conceded that the distinct elements of the offence were, the use of a false pretence; obtaining the consent of another;

³ Section 32(1) Larceny Act 1916 (UK)

parting with or transferring anything capable of being stolen; and with the purpose or intent to defraud.

- [48] Ms. Greenidge quite rightly pointed out that the main area of disagreement between the parties concerned the element of obtaining consent by false pretence which is canvassed by section 39 of the Criminal Code. Ms. Greenidge took the position that section 39 cannot be viewed in isolation and must be read in conjunction with section 38 of the Criminal Code. The court agrees with this submission but will add that sections 38 and 39 (2) (c) are of critical importance in resolving the issue at hand.
- [49] Relying on the foregoing proposition, Ms. Greenidge contended that the present case did not involve an allegation concerning a contractual arrangement in which a representation was made as to the value, worth or quality of a thing within the meaning of section 38. According to Ms. Greenidge, the present case concerns representations made relative to the quantum of the product delivered and had nothing to do with the character, condition, worth or intrinsic quality of the thing delivered. The court does not agree with this submission for the reasons which the court shall give later on in this judgment.
- [50] In the court's view, it appears that Ms. Greenidge's argument was that the value or worth of the product sold and delivered was not commensurate with the quantity supplied. It seemed also that Ms. Greenidge held the view that the question of the condition, value or worth of the thing supplied is intimately connected to what is canvassed by section 39(2) (c) for the purpose of determining whether the consent of the complainant was obtained by a false pretence for the purpose of section 38 of the Criminal Code. If the court understands Ms. Greenidge's argument correctly, she appears to be saying that it is only in such a case where the representation is made with respect to the quality or value of a thing that the proviso that consent is not deemed to have been obtained by false pretence unless the thing delivered prove worthless becomes operative. There is no allegation made in the present case that the thing delivered was worthless. In Ms. Greenidge's view, the present case

did not interrogate any question relative to section 39(2) (c); and therefore, the provisions of that section were irrelevant for the purposes of the present discourse.

[51] What is critical, in the court's view, is the nature of the representation. It appears that the present allegations made out against the defendants did not concern any representation relative to the condition, quality, value or worth of the thing delivered, but a representation or statement of fact relative to the weight of the thing supplied. It seems therefore, that the question that arises in the present case is whether a representation as to the weight of the thing supplied can amount to a false representation or "false pretence" for the purposes of sections 38 and 39 of the Code. Mr. Hood's argument is that it cannot.

[52] In fine, the prosecution's argument was that no question as to the element of consent canvassed by section 39(2) (c) of the Criminal Code arises in the present case and no representation was ever made as to the quality or the nature of the goods supplied. However, the prosecution's contentions relate entirely to the question of quantum in so far as the false pretence entailed what they describe as a prolonged and systematic false representation as to the weight of product supplied that was paid for and never supplied.

[53] A convenient starting point is section 279 of the Criminal Code which provides that:
"Whoever defrauds any person by any false pretence shall be liable to imprisonment for five years."

[54] Section 39 of the Criminal Code provides a discrete definition of what constitutes a "false pretence" for the purposes of section 279. Therefore, it is important to examine the provisions of the Criminal Code to divine the meaning of the terms "defraud" and "false pretence".

[55] Section 17 of the Criminal Code provides:
"For the purposes 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.”

[56] In its natural and ordinary meaning, an intent to defraud involves depriving someone of something of value with an intent to cause by means of forgery, falsification or other unlawful act, any gain capable of being measured in money, or the possibility of such gain, to any person at the expense or to the loss of any person. It appears to the court that one of the defendants’ challenges to the substance of the amended indictment concerns the meaning of the words “forgery, falsification or other unlawful act. In simple terms, the question that arises is whether the “over-invoicing” alleged by the prosecution fell within the ambit of “forgery, falsification or other unlawful act. To put it another way, whether the concept of over-invoicing amounts to an unlawful act for the purposes and within the meaning of section 17. Does the criminal law criminalise over-invoicing per se? Does the term over-invoicing amount to an unlawful act for the purpose of section 17? It is without a doubt that a false pretence would amount to an “unlawful act” for the purposes of section 17. However, the question that remains is whether over-invoicing could amount to a false pretence used or done with the intent to defraud for the purposes of section 17.

[57] In the court’s view, at first blush it appears that by no stretch of the imagination can the allegation of “over-invoicing” amount to a forgery or a falsification for the purposes of the criminal law. In fact no such allegation has been made relative to this. Also, it is arguable that there is no law that prohibits “over-invoicing” which makes it amount to an unlawful act for the purposes of section 17 of the Criminal Code which is punishable by law. The view expressed by the court stems from the principle of ejusdem generis construction. This principle of statutory construction states that where general words or phrases follow a number of specific words or phrases, the general words are specifically construed as limited and apply only to persons or things of the same kind or class as those expressly mentioned.

[58] Assuming that the foregoing observation made by the court is correct, it follows that the allegation in this case must be based on some deceit, deception, forgery,

falsehood or other unlawful act committed by the defendants. Falsification, in the court's view, denotes a deliberate lie.

[59] Forgery, has its natural and ordinary meaning. For the purposes of the criminal law "forgery" has a technical meaning which connotes the forging of a document by making a false document with the intention that it be used to induce somebody to accept it as genuine and by reason of so accepting it to do or not to do any act to their own or any other person's prejudice.

[60] Falsification clearly relates to a person making a false document if they make or alter the document, or any material part of it, with intent to cause it to be believed. The word "alteration" in the context of the criminal law includes any cancellation, erasure, severance, interlineations, or transposition in a document or in any material part to the document and the addition of any material part to the document, and any other act or device by which the purport, operation, or validity of the document may be affected.

[61] In the present case there is no allegation that the invoices in question were forgeries or were falsifications within the meaning ascribed by the criminal law. In the court's view, the mere allegation of the overstated weight of the product delivered to the complainant did not in or of itself amount to a falsification or forgery of the invoices within the technical meaning of the words for the purposes of the criminal law.

[62] The words, "other unlawful act", in the court's view, is a term that covers more ground than either forgery or falsification; and includes any other means that are not forgery or falsification, and properly regarded as dishonest according to the standards of reasonable people. Therefore, it seems that the unlawful act complained of in this instance is the statement of an existing fact which was false – a false pretence. The prosecution took the view that the exaggeration of the weight of the chicken supplied by the defendants amounted to a false representation or false statement about the condition of the thing supplied, namely, its weight and therefore was made with the intent to defraud.

- [63] It is noteworthy that the counts in the indictment relative to defrauding by false pretences do not mention any ingredient of intent to defraud or the means by which the consent of the complainant was obtained. It is beyond dispute that an essential element or ingredient of the offence is the intent to defraud which requires that the defendants meant to say or do those things that amounted to forgery, falsification or other unlawful means canvassed by section 17 of the Criminal Code; and knew that to do them could put at risk the economic or financial interest of the complainant. However, as Ms. Greenidge would have correctly pointed out, relying on the provisions of the CPC, that such an omission is not necessarily fatal to the indictment.
- [64] However, in the court's considered view, the mere allegation of "over-invoicing" by itself cannot amount to an unlawful act contemplated by section 17. The use of that terminology apart from being an unnecessary averment is also misleading. More importantly, the terminology "over-invoicing" cannot amount to an unlawful act by which the necessary intent to defraud can be articulated for the purposes of forming a constituent element of the offence of defrauding by false pretence.
- [65] Section 33 of the Criminal Code draws a distinction between the offences of stealing and false pretences and provides:
- “(1) If it is proved, on behalf of a person accused of having stolen a thing, that the owner thereof, or any person having authority to part with the ownership thereof, gave consent to the appropriation of it by the accused person, then, although such consent has been obtained by deceit, the accused person shall not be deemed guilty of having stolen the thing, but he or she may be convicted of the crime of having defrauded by false pretences, if his or her acts amounted to such crime.
- (2) The consent to be proved by the accused person, for the purposes of this section, is an unconditional consent to the immediate and final appropriation of the thing by the accused person, by way of gift or barter, or of sale on credit, to the accused person.”
- [66] The court thinks that the provisions of section 33(1) above are pertinent to the present discussion. Section 33(1) suggests that deceit is an element of the offence of defrauding by false pretence in so far as consent was obtained by such deceit

provided that the defendants' act or acts amounted to such crime. Deceit in this context means an untrue statement made by a person who knows that it is untrue, but makes it despite that risk, to induce another person to act on it, as if it were true, to that other person's detriment.

[67] The court believes that the proviso contained in section 33(1), that is, that the defendant's act amounted to such a crime, requires that the impugned act amounts to a false pretence within the meaning of sections 38 and 39 of the Criminal Code. The defendants have contended that the acts alleged by the prosecution, notably "over-invoicing" did not amount to a false pretence captured by sections 38 and 39 of the Criminal Code. Also, and by extension, the defendants say that although consent to part with something of value within the context of section 38 was indeed obtained, such consent was not obtained by any act that amounted to a false pretence since the prosecution was relying on the concept of "over-invoicing".

[68] The court agrees entirely with the foregoing submission. The counts charging defrauding by false pretence in the indictment do not state with certainty or precision the nature of the device used or conduct engaged in that amounted to the unlawful act giving rise to a false pretence. The mere allusion to over-invoicing in the court's view is insufficient.

[69] It seems to the court, that the following questions that immediately arise from the foregoing discussion are (1) whether "over-invoicing" can amount to a false pretence canvassed by sections 38 and 39 of the Code; (2) whether the words "over-invoicing" in the context of the allegations made in the present case, could fall within the category of "deceit", that is, an untrue statement made by a person who knows that it is untrue, but makes it despite that risk, to induce another person to act on it as if it were true, to that other person's detriment (other unlawful act)⁴ would warrant conviction of the crime of defrauding by false pretences, if the act complained of amounted to such crime⁵; by extension (3) could the act of "over-invoicing" amount

⁴ Section 17

⁵ Section 33(1)

to the crime of defrauding by false pretence based on the allegations made in the present case; (4) what is the mischief or conduct which the law on false pretence as canvassed by the various provisions of the Code intend to criminalise; and finally, (5) is “over-invoicing” the act or conduct which the Code intends to criminalise.

[70] A convenient starting point would be to consider section 38 of the Criminal Code. Section 38 of the Criminal Code defines defrauding by false pretence and states:

“A person is guilty of defrauding by false pretences if, by means of any false pretence, he or she obtains the consent of another person to part with or transfer the ownership of anything of which the crime of stealing can be committed.”

[71] The term “ownership of anything of which the crime of stealing can be committed” is explained in section 37 of the Criminal Code. It is not necessary to set out the terms of section 37 here as it is generally conceded that money is something in respect of which the crime of stealing can be committed and falls within the ambit of section 37.

[72] More importantly, section 39 of the Criminal Code provides a comprehensive definition of false pretence, and reads:

(1) A false pretence is a representation of the existence of a state of facts made by a person, either with the knowledge that such representation is false or without the belief that it is true, and made with a purpose to defraud.

(2) For the purposes of this section—

(a) a representation may be made either by written or spoken words, or by personation, or by any other conduct, sign, or means, of whatsoever kind;

(b) the expression “a representation of the existence of a state of facts” includes a representation as to the non-existence of anything or condition of things, and a representation of any right, liability, authority, ability, dignity, or ground of credit or confidence as resulting from any alleged past facts or state of facts, but does not include a mere representation of any intention or state of mind in the person making the representation, nor any mere representation or promise that anything will happen or be done, or is likely to happen or be done;

(c) a consent shall not be deemed to have been obtained by a false representation as to the quality or value of a thing, unless, in the opinion of the Court, the thing is proved to have been substantially worthless for the purpose for which it is represented to be fit, or to have been substantially a different thing from that which it is represented to be; and

(d) subject to the foregoing rules, if the consent of a person is in fact obtained by a false pretence, it is immaterial that the pretence is such as would have had no effect on the mind of a person using ordinary care and judgement.

[73] The court thinks that it is necessary at this stage to attempt to interpret the provisions of section 39 according to its proper construction. This clearly will involve some dissection of the relevant parts of the section.

[74] Section 39(1) defines a false pretence as a representation of the existence of a state of facts made by a person, either with the knowledge that such representation is false or without the belief that it is true, and made with a purpose to defraud. This is the general allegation made by the prosecution relative to the invoices which are the subject matter of the present proceedings. According to the definition in section 39(1) the invoices can properly be regarded as containing a representation as to the existence of a state of facts, that is, a false representation as to the weight of the product delivered.

[75] Also, the invoices allegedly presented by the defendants can without a doubt satisfy the provisions of section 39(2) (a) to the extent that they contained a representation in written form or words.

[76] The more vexing issue is what is canvassed by section 39(2) (b) as falling into the category of a false pretence. Section 39(2) (b) explains the meaning of the “existence of a state of facts” contained in section 38 by inclusion. Section 39(2) (b) describes with precision and specificity what is included in the definition of the “existence of a state of facts” and therefore what would amount to a false pretence for the purposes of section 39(1). The present case does not interrogate any representation of any right liability, authority, ability, dignity, or ground of credit or

confidence as resulting from any alleged past facts or state of facts. The present case concerns a representation as to the “condition” of things.

[77] What then is the meaning of the words “condition of things” used in section 39(2) (b)? In ordinary language the word “condition” is used to connote the state of something with regard to its appearance, quality or working order or operability, the fitness of a thing, soundness of goods, the resilience of a thing, the suitability of a thing for a particular purpose, or the capability of a product. In the court’s view, the use of the words “condition of things” in section 39(2) (b) is ambulatory and may have been intentionally used in the statute to cover a broad area of usage that also includes the quality and value of a thing. Therefore, it can fairly be construed to include the weight of a thing.

[78] Section 39(2) (b) also excludes certain representations from being a false pretence such as, a mere representation of any intention or state of mind in the person making the representation, nor any mere representation or promise that anything will happen or be done or is likely to happen or be done. Therefore, the section excludes representations that are merely expressions of opinion of the likelihood of the future occurrence of events or acts; or the expression of opinion as to the existence of a state of facts.

[79] Now the prosecution has argued vehemently that the present case does not concern any representation as to “quality” or “value” of a thing as canvassed by section 39(2) (c). To the contrary, Mr. Hood appeared to have taken the stance that the prosecution has mistakenly or otherwise erroneously relied on the concept of “quantity” or “weight” and have seemingly over-looked or misinterpreted the use of the words “quality” and “value” of a thing in section 39(2) (c). On the other hand, the prosecution seem to have taken the view that section 39(2) (c) by its wording pertains to a different species of representation than what is canvassed by section 39(2) (b).

[80] The court understood Mr. Hood’s argument to be that the prosecution seemed to have lost sight of the fact that the allegation against the defendants ought to have

been with respect to the “value” of the thing in respect of which the complainant was defrauded. In other words, the false representation was as to “value” or “worth”. By extension, the present allegation was that the complainant was defrauded of the difference in value of what was represented to be delivered on the invoice and what was actually delivered. It is worthy to note at this stage, that in the present case, there was no agreement as to the delivery of any specific weight of the product at any specific time. It is also critical to note at this stage that what the complainant was allegedly defrauded of was the difference in value between what was represented to have been delivered on the invoices and what was in fact delivered. Therefore, the prosecution’s reliance on weight is unfortunate.

[81] To follow Mr. Hood’s argument to its logical conclusion would mean that the allegation of “over-invoicing” would fall within the exclusion provided for by section 39(2) (b) and the exclusionary provision as to consent contained in section 39(2) (c). The court thinks it is prudent at this stage to consider the meaning of the words “quality” and “value” as used in section 39(2) (c). There appears to be no legal definition of the words “quality” or “value”. Therefore, the words must be interpreted in accordance with their usage in the ordinary English language. The ordinary meaning of the word “value” in the context of section 39(2) (c) connotes or is synonymous with a thing’s use, utility, worth, usefulness, price, market price, asking price, efficacy, estimate or estimate of monetary worth. In ordinary language the word “quality” refers to the degree of excellence of something, how good or bad something is, the peculiar and essential character of something, or its inherent features.

[82] Clearly, if one adopts the definition of the words “value” and “quality” within the context of section 39(2) (c) it becomes apparent that the representation in this case involved a representation as to value and not quality or quantity.

[83] Therefore, in the court’s view, the prosecution’s reliance on “quantity” or “weight” is unfortunate and indeed hypocritical for the simple reason that the counts in the

indictment as worded relate to the difference in the monetary value between what was stated on the invoices and what was alleged to have been actually delivered.

[84] In fact, the counts in the indictment refer to the monetary value relative to the property in respect of which the complainant was defrauded. The complainant is clearly aggrieved by the monetary loss occasioned by the false representation as to value and not on account of being deprived of the weight paid for. It is the loss relative to value and not with respect to weight that is at the foundation of the allegation made against the defendants.

[85] In the premises, the only interpretation to the term “over-invoicing” used in the indictment must be taken within the context of value or a representation as to value. Therefore, the false representation being one as to value falls within the context of section 39(2) (c). That being the case, the complainant’s consent cannot for the purposes of that section be construed as having been obtained by a false pretence since there is no allegation that what was delivered and paid for proved substantially worthless for the purpose for which it was represented to be fit, or to have been substantially different from the thing it was represented to be. Therefore, in the context of section 39(2) (c) it cannot be said that the consent of the complainant was obtained by false pretence.

[86] It follows, therefore, that the element or ingredient of consent not having been obtained by the false pretence, that the indictment discloses no offence known to law or charges the defendants with an offence for which they can incur no criminal liability.

[87] In the court’s view, the provision of the Criminal Code which appears entirely dispositive of the present discussion is section 39(2) (c) and which forms the substance of the argument advanced by the defendants.

[88] Distilled to its essence, the defendants’ proposition is that whereas the prosecution rely on the concept of “quantity” as substantiating the basis of the false pretence, the provisions of section 39(2) (c) mandates that a consent shall not be deemed to

have been obtained by a false representation as to the quality or value of a thing, unless, in the opinion of the Court, the thing is proved to have been substantially worthless for the purpose for which it is represented to be fit, or to have been substantially a different thing from that which it is represented to be.

[89] Therefore, the defendants argue that the prosecution has not framed the impugned counts in the indictment to encompass the element of consent required by sections 38 and 39(2) (c) of the Criminal Code. In other words, the counts in the indictment related to defrauding by false pretences do not disclose any offence known to law by virtue of the combined operation of sections 17, 38 and 39 in as much as the prosecution has not alleged or made any averment in the indictment that the “over-invoicing” amounted to a false pretence, that the complainant’s consent was obtained by a false pretence and that the consent was obtained relative to the product supplied having been proven to be substantially worthless for the purpose for which it was represented to be fit or was substantially a different thing from which it was represented to be.

[90] Therefore, the defendants’ argument appeared to be that consent in the present case was not obtained by any false representation and therefore, the prosecution’s failure to make these averments in the indictment were fatal to the extent that the indictment disclosed no offence known to the criminal law and that in any event, the offence charged is not commensurate with the evidence relied on by the prosecution or the averments as made in the indictment.

[91] By extension the defendants submitted that even if as the prosecution allege, the quantity supplied affected the value of the product supplied, the prosecution was still bound by the provisions of section 39(2) (c) that “the thing is proved to have been substantially worthless for the purpose for which it was represented to be fit or have been substantially a different thing from that which it is represented to be.”

[92] Mr. Hood adopted the posture that the present case interrogates the “under supply” of goods in a commercial contractual relationship between two parties; and therefore, in effect, and on the basis of section 39(2) (c), involved only the question

of civil liability and did not attract criminal liability as there was no consent obtained by false pretence. Mr. Hood postulated the view that the concept of “over-invoicing” found its embodiment in the realm of commercial law and did not attract the attention of the criminal law.

[93] In a nutshell, Mr. Hood’s argument on this point appeared to be that the facts relied on by the prosecution were not consistent with the commission of the offence of defrauding by false pretences as the defendants had not delivered a product that was substantially worthless for the purpose for which it is represented to be fit, or to have been substantially a different thing from that which it is represented to be. In fine, Mr. Hood’s argument was that the provisions of section 39(2) (c) had not been satisfied because the complainant’s consent was obtained by a false representation as to the value of a thing.

[94] The prosecution relied extensively on the overstated invoices relative to weight as the basis of their case of defrauding by false pretence. In short, the prosecution’s position was that the false pretence alleged was what they described as “over-invoicing”. To that extent the prosecution appeared to have relied on the provisions of section 39(2) (a) and (b) of the Criminal Code. Additionally, the prosecution relied on the quantities stated in the relevant invoices as amounting to the “false representation” for the purposes of section 39(2) (a) and (b) of the Criminal Code.

[95] It is undeniable that the consent of the complainant in this case was in fact obtained. However, what is critical is whether such consent was obtained by a false pretence. The court is inclined to answer this question in the negative for the reasons which follow. The representation which the prosecution allege that the defendants used to obtain the consent of the complainant, was that less product was delivered than what the defendants represented it to be. The relevance of this will soon become apparent in the discussion which follows. One must be reminded of the court’s previous observations relative to the concept of “value”.

[96] According to Mr. Hood, the contract between the parties was the supply and delivery of chicken. It has not been alleged that the defendants supplied any other thing

which was not chicken and which was proven to be worthless for the purpose for which it was intended. Therefore, Mr. Hood submitted that by no stretch of the imagination can the prosecution establish on the facts of the case that the complainant's consent was obtained by false pretence particularly in light of how the counts in the indictment are framed.

[97] Therefore, according to Mr. Hood, the defendants have committed no offence known to the criminal law and hence cannot be charged with the offence of defrauding by false pretence. By extension, Mr. Hood submitted that all the other counts in the indictment would automatically fall away. It is on this basis that Mr. Hood seeks to have the indictment quashed.

[98] In the court's view, the provisions of section 39 of the Criminal Code must be read as a whole in order to determine the nature of the conduct which the law criminalises. In the court's considered view, the provisions of section 39(2) (c) cannot be regarded as inconsequential for the purpose of the present case. It appears that what is instructive, as the court has already stated are the provisions of sections 38 and 39(2) (a) (b) and (c) and not merely section 39(2) (a) and (b) upon which the prosecution rely to buttress their case.

[99] What is germane to the offence of defrauding by false pretence for the purpose of section 39(2) (c) is that the consent must have been obtained by a false representation as to the quality or value of a thing; but only where, the thing is proved to have been substantially worthless for the purpose for which it is represented to be fit, or to have been substantially a different thing from that which it is represented to be can the consent be said to have been obtained by false pretence.

[100] Therefore, it seems that assuming that the prosecution's case against the defendants did not touch or concern a representation made by the defendants as to the character, condition, value or intrinsic quality of the thing delivered, the defendants' assertions relative to section 39(2) (c) would be considered ill-conceived. In the present case, there appears to be no dispute that the thing delivered was chicken and that it was fit for the purpose for which it was intended.

- [101] It is clear from the provisions of section 39(2) (c) that a false representation is a representation about any present or past fact that is false. The representation may be made in words or in some other way. Merely exaggerating or depreciating the quality or value of something is not a false pretence, unless it amounts to a deliberately dishonest statement about the quality or value of the thing. However, in such an instance, consent cannot be deemed to have been obtained unless the thing is proved to have been substantially worthless for the purpose for which it is represented to be fit, or to have been substantially a different thing from that which it is represented to be.
- [102] Therefore, it would appear that the prosecution's argument is that the provisions of section 39(2) (c) have no application to the present case in so far as the representation relied on by the prosecution did not relate to the quality or value of the chicken supplied by the defendants is without merit. Also, there is no averment by the prosecution that what was supplied by the defendants was substantially worthless for the purpose for which it was represented to be fit, or was substantially a different thing from that which the defendants represented it to be. In the premises, the prosecution says that the provisions of section 39(2) (c) is not triggered and does not affect the question of consent in this instance. The court begs to differ.
- [103] The prosecution maintained that the counts in the indictment for the offence of defrauding by false pretences had nothing to do with any false representation as to the quality or value of a thing, where, the thing is proved to have been substantially worthless for the purpose for which it is represented to be fit, or to have been substantially a different thing from that which it is represented to be. To the contrary, they argue that the counts in the indictment were concerned with representations as to the quantity and therefore, the monetary value of the product delivered or supplied.
- [104] The question that arises is two-fold; (1) whether the "over-invoicing" which resulted in the over valuation of the quantity of the product delivered amounted to a representation of the existence of a state of facts within the context and meaning of

section 39(2) (b) of the Criminal Code and thereby amounted to a false pretence by operation of section 39(1) of the Criminal Code; and (2) whether the representation alleged to have been made falls within the exception provided by section 39(2) (b) in that the alleged representation as to quantity did not amount to or include a mere representation of any intention or state of mind in the person making the representation, nor any mere representation or promise that anything will happen or be done, or is likely to happen or be done. In the court's view the second question must be answered in the negative.

[105] In the court's opinion the allegation of "over-invoicing" did not amount to or include a representation as to the non-existence of anything or condition of things, and a representation of any right, liability, authority, ability, dignity, or ground of credit or confidence as resulting from any alleged past facts or state of facts. It is not inconceivable that the allegation of "over-invoicing" relative to the quantity of the product supplied cannot reasonably be taken to have been a mere representation of an intention or state of mind on the part of the defendants or a mere representation or promise to deliver a certain quantity of product or a mere representation or promise that a certain quantity of the product would be delivered or was likely to be delivered to bring it within the exception provided for by section 39(2) (b) of the Criminal Code.

[106] The court thinks that the challenge which the prosecution faces relates to the use of the terminology "over-invoicing". The result is that the counts in the indictment are not only defective in that they are insufficient with respect to the particulars of the false pretence alleged but also by their wording disclose no offence known to law, or simply put, the counts as worded do not disclose any criminal offence.

[107] Furthermore, in the court's considered opinion, the counts in the indictment as worded do not merely amount to a mere defect or failure to include a formal averment, but instead omit to include the matters relative to the very substance of the charge. The mere averment relative to "over-invoicing" means that the counts in the indictment disclose no offence known to the law – this averment cannot be said

to amount to a mere defect as it goes to the very substance of the offence which the defendants are alleged to have committed. Moreover, the mere allusion to “over-invoicing” without more does not and cannot ipso facto amount to the crime of defrauding by false pretence.

[108] In the court’s view, the use of the term “over-invoicing” appears to have its seat within the boundaries of a commercial context and not the criminal law. As will be seen, the present case does not involve any contractual arrangement or agreement for any specified weight to be delivered at any specified time. It will be necessary to look at the commercial context in which the over-invoicing is alleged to have occurred. The prosecution, in their written submissions had made specific reference to certain depositions from which the conduct of the parties can be distilled.

[109] Crown Counsel relied on several decisions emanating from without the jurisdiction to substantiate the point that the misrepresentation as to quantity formed an intrinsic element of the offence of defrauding by false pretences. On the other hand, Mr. Hood insisted that on the basis of section 7 of the Criminal Code, the court should not consider these decisions which were based on common law and other statutes as the court was proscribed from so doing by the provisions of that section.

[110] Section 7(c) of the Criminal Code under the rubric “General rules of construction” provides that:

“The following general rules shall be observed in the construction of this Code, namely—

(c) in the construction of this Code, a Court shall not be bound by any judicial decision or opinion on the construction of any other statute, or of the Common Law, as to the definition of any offence or of any element of any offence.”

[111] The court accepts the defendants’ submission that the provisions of the Criminal Code ought to be construed strictly and without reference to any other law. It is unclear whether the defendants’ argument on this specific point was confined to the substantive law as opposed to procedural matters. However, for the sake of

exposition the court will examine at least one of the cases cited by the prosecution in their written submissions.

- [112] Before dealing with the specific points raised by the prosecution and the defendants it will be worthwhile to examine the state of the authorities on the aspects of the law of false pretences and its application to indictments. This will ineluctably involve some discourse on the evolution of the law of false pretences under the common law to its present day statutory form. The court thinks that such a process will serve to assist in the resolution of the issues raised in the present proceedings. This approach is for the purposes of exposition only and to amplify the conclusions which the court has arrived at in this judgment.
- [113] In a hypothetical case where for example a defendant ('D') is charged with defrauding a complainant ('C') by false pretences, and the allegation is that D agreed to sell and C agreed to buy a quantity of lumber for 'X' dollars; and D was paid 'Y' dollars only having delivered half of the quantity of timber agreed. Can D be charged for defrauding C by false pretences where the allegation is that D defrauded C by the difference in the price between the quantity of timber agreed to be delivered and the quantity of timber actually delivered? In such a case, the false representation would be the difference in the quantity of the timber actually delivered where D represented that a greater amount had been delivered and received payment for the full amount.
- [114] The abovementioned hypothetical case can be distinguished from another hypothetical case where D had falsified his account book to make it appear that he had worked for more money than he was entitled to and so had received the excess fraudulently. D is indicted for defrauding by false pretence and convicted. Was the indictment bad because it did not disclose any false pretence within the statute? Assuming that the allegation of false pretence was that D falsely represented the time spent in doing the work and thereby exaggerated the value of the work done, it cannot be said that this amounted to a false pretence. Clearly, D would be expressing his opinion as to the value of his work.

- [115] Now the defendants contend that the alleged representations as to value, even if false, were merely matters of opinion, amounting to embellishment in the course of contract of sale and would not in law be a false pretence. Assuming this to be correct, then if the full price charged had been paid the full offence in law could and would not have been committed.
- [116] It appears that at common law, the case law developed and arose mainly out of misrepresentation as to the quality, value or worth of things sold or made by the owner which induced the buyer to pay over the purchase price to the owner. Under the common law it was felt that it was not in the public interest to interfere with the day to day bargaining in the ordinary and usual course of trade so that a trader was made subject to criminal prosecution where they made a false representation where the result of such misrepresentation was not that the purchaser got for his money something worthless, but only something worth less than what he paid for it. It was felt that such a situation should be litigated in civil proceedings. In the court's view, the common law position is what is reflected in and reinforced by section 39(2) (c) of the Criminal Code.
- [117] It appears from the case law that at common law, a false representation of what is a mere matter of opinion falling within the category of untrue praise in the course of a contract of sale is not indictable. It was felt that it was not in the public interest to interfere with the day-to-day bargaining in the ordinary and usual course of trade and to make undue commendation would expose a trader or seller to criminal prosecution. The result of such a misrepresentation was not that the purchaser got for his money something worthless, but only something worth less than what he paid for it; and this, under the common law was felt should be litigated in civil proceedings.
- [118] The defendants' contention on this point raises the following question: that is, whether, if money be obtained through the medium of a contract between a defendant and the party defrauded, whether the charge of defrauding by false pretences can be sustained. It can quite plausibly be argued that the thing obtained

through the false pretence may be said to be the contract, and not the money which is paid in fulfillment of it, and which the party is probably by its terms liable to repay. This is not to say that liability to an action under the civil law can of itself furnish any answer to an indictment for defrauding by false pretences. However, in this case, it cannot be said that the contract amounted to the false pretence. The allegation concerns the thing obtained (money) through the false pretence (“over-invoicing”).

[119] Therefore, is the offence of defrauding by false pretences committed where for example a seller falsely represented that a chain was silver and accepted payment from the buyer for it? If it turns out that the chain was not silver at all, does the statute apply to a mere representation as to the value and quality of the goods in the course of a bargain for the sale of them, because in such a case, the goods were the consideration for the money? Can it be said that this was nothing more than a false statement as to the value of the goods? If the false representation is confined to value, it is difficult to see how the statute can apply, because, unless the goods were wholly worthless, the statement would be in part true. How then is the line to be drawn? Clearly, the misrepresentation would be considered a false pretence as the goods sold would be substantially different from what was bargained for.

[120] It seems to the court that the prosecution’s case proceeds upon a mere representation during the sale and purchase of a commodity on the basis of the value of the commodity. If one looks at what is stated upon the face of the indictment, it resolves itself into a mere representation as to the worth or value of the commodity that was sold, bearing in mind that the commodity was of the species that it was represented to be to the purchaser, namely chicken, and that the purchaser received it.

[121] Therefore, in the court’s view, it could never have been the intention of the legislature to make it an indictable offence for a seller to exaggerate the worth or value of that which he was selling. It cannot be said that a misrepresentation at the time of sale of the worth or value of goods, can amount to a case that fell within section 279 of the Criminal Code. On the contrary, where the seller warranted the

goods to be entirely different from what they really were, and the goods were unfit or entirely worthless for the purpose for which they were intended, then the consent can be said to have been obtained by false pretence.

[122] In the premises, any exaggeration as to value or worth in the ordinary course of dealings between buyer and seller during the process of a bargain or sale, cannot be the subject of criminal prosecution. The court thinks that the present case falls within this proposition and hence, the indictment cannot stand. The statute was precisely intended to make falsehoods in respect of contracts for sale indictable where the substance of the contract is falsely represented, and by reason of that the money is obtained, the indictment can be considered good.

[123] Therefore, it seems that the offence of false pretences ought not to be extended to a situation where the purchaser gets some value for his money compared to a situation where the purchaser receives something of no value at all. The former case sounds much more in damages than anything else. What the purchaser really loses is the difference in value between what was agreed and what was delivered. The court's reasoning is implicit in the statute itself: "A person is guilty of defrauding by false pretences if, by means of any false pretence, he or she obtains the consent of another person to part with or transfer the ownership of anything of which the crime of stealing can be committed." That means, in the court's view, whether he obtains it directly or not, by fraud. It would certainly have been the case if the purchaser's consent was obtained directly or indirectly by the seller misrepresenting that the subject matter of the sale was chicken when in fact it was pigeon. In such a case it could clearly be said that the consent was obtained by false pretences and such a misrepresentation would result in defrauding the purchaser of the amount for which the thing was sold. The misrepresentation as to the subject matter of the contract of sale would definitely be regarded as fraudulent. The court thinks that the wording of sections 38 and 39 of the Criminal Code should be followed explicitly.

[124] Therefore, a false representation as to the "worth" or value of a thing is not an offence in law if, as intended, a sale of it at a purchase price much higher than its

real worth or value results. Clearly, this is indeed the case here. The transactions in the present case did involve representations as to the “worth” or “value” of the thing sold. To that extent, the present case falls squarely within the ambit of section 39(2) (c). Therefore, the defendants’ submissions on the point fall within the general principle canvassed by that section of the Criminal Code.

[125] The allegations made by the prosecution concerned the sale of chicken according to the weight of the chicken delivered and the defendants misrepresenting the actual weight of the chicken delivered which was less than the weight stated on the invoices presented to the complainant with the result that the defendants received money as payment in excess of the actual weight of the chicken delivered. Therefore, it appears to the court that arguably, the prosecution on the foregoing basis, has at the very least, intended to disclose a prima facie case of an offence known to law, namely, defrauding the complainant of various sums of money by false pretence contrary to law.

[126] It seems to the court, that to determine whether a false representation amounts to a false pretence and therefore falls within or without the Criminal Code, one must examine the extent to which it goes, and the subject matter to which it is applied.

[127] In the present case, the false representation concerned “worth” or “value”. Notwithstanding the prosecution’s reliance on the concept of “quantity” or “weight” as the case may be, ultimately it is the difference in “worth” or “value” that forms the subject matter of the charge of defrauding by false pretences. Hence the statutory definition or concept of false pretence ought not to be construed to the extent where the purchaser gets value for his money. The court thinks that this is the principle encapsulated in section 39(2) (c).

[128] However, in the present case, the misrepresentation relied on by the prosecution related to a representation of the existence of a state of facts which included a representation as to the non-existence of anything or condition of things; that is, the weight of the chicken actually delivered by the defendants. Can it be said that the offence can prima facie be said to have been committed assuming that the evidence

relied on by the prosecution is true? In other words, can the offence be said to have been committed in the manner in which the prosecution alleges or as set out in the counts in the indictment?

[129] The court finds that there is a very important distinction to be made between the sale of a product lawfully for more than it is worth and the sale of a product at a particular price and the delivery of a lesser quantity for which it is promised or agreed to be delivered. In the former case, no such representation as to worth or value could be held to be a crime where a representation is made as to “worth” or “value” just because the prosecution is able to prove that the property delivered is worth less than acceptable as good law. In such a case it would be an expression of opinion rather than a statement of fact.

[130] However, in the latter case, it is arguable that there may prima facie be an element of fraud in the allegations made against the defendants to the extent that the representation as to the actual weight delivered was less than what it was represented to be. However, in this instance, a case such as the latter would be captured by the provisions of section 39(2) (c) and the complainant’s consent cannot be said to have been obtained by the false pretence.

[131] In the court’s view, a charge would be bad in law as not disclosing an offence within the meaning of the Criminal Code if the representation set out in it, is so worded that it could amount to either or fall within the former category. This is clearly the situation in the present case.

[132] Therefore, one must look at the wording of the count itself. The false representation in the present case was not that the defendants did not deliver chicken. On the contrary, the false representation alleged, was that the weight of the chicken delivered was less than the weight stated in the invoices and the defendants defrauded the buyer by obtaining payment by the buyer for the weight stated in the invoices. In such a case, it can be said that there was a false representation or opinion as to value or worth.

- [133] Therefore, as in the present case, a false representation of the worth of a thing is not an offence in law if, as intended, a sale of it at a purchase price much higher than its real worth results. It would be a civil wrong only, even if it could be proved that the seller did not really hold this opinion. Hence, however different the position might be in the civil law, a false statement of opinion with intent to defraud, which is not an offence, and not one of existing fact, with similar intent which is.
- [134] The court must make a determination based on the wording of the indictment alone and of the false pretence as worded in the particulars. If the false pretence, and literally it is a statement of fact, then it is a pretence of fact and an offence is disclosed. However, if, literally, it is capable of being either, an offence is not disclosed. The difficulty in making such a determination in the present case is that the counts in the indictment do not disclose what the false pretence actually is; they simply make reference to “over-invoicing”.
- [135] It is necessary, therefore, to critically examine what is a criminal false pretence or a false pretence which attracts criminality on the wording of the charge in the indictment where a false pretence is an ingredient of the charge.
- [136] In the course of argument before the court, the prosecution maintained its reliance on the wording of the charges in the indictment. On the other hand the defendants took the view that mere reliance by the prosecution on the word “over-invoicing” amounted to an insufficiency of particulars of the false pretence alleged, with the result that the charges were not only defective and therefore a nullity, but resulted in it disclosing no offence known to the criminal law primarily on the basis of the proviso contained in section 39(2) (c).
- [137] The court formed the impression, given the posture adopted by Ms. Greenidge in the course of oral argument and the context of the prosecution’s written submissions, that the prosecution was content to proceed on the indictment in its current wording.

- [138] Another discrete question which arises for the court's consideration is whether the prosecution's failure to state the particulars of the false pretense in the particulars of the offence, amounted to such a defect that it resulted in the charging of an offence unknown to law, so as to render each count alleging defrauding by false pretense, bad in law and thereby rendering them a nullity.
- [139] The prosecution relied extensively on the relevant provisions of the CPC in support of their argument that the failure to state particulars of the offence in the indictment did not vitiate or make the indictment defective or result in its nondisclosure of an offence unknown to the law.
- [140] The general principle is that each count shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act to be proved against him or her, and to identify the transaction referred to in the count. However, the absence or insufficiency of such details shall not vitiate the count, but the Court may order an amendment or further particulars mentioned.
- [141] It should be clearly understood that the defendants' challenge to the indictment did not involve any contention as a matter of law that the prosecution had no evidence to establish that an offence was committed. Instead, what is alleged by the defendants is that the factual allegations relied on by the prosecution, cannot amount to the offence of defrauding by false pretense.
- [142] In the court's view, the material question is not whether there is evidence available to show that an offence known to law was committed, but whether the averments of facts or the statement of the particulars of the charges disclosed the commission of an offence known to the law, which is a legal and not a factual issue.
- [143] It appears to the court that the prosecution, by the nature of the allegations made as a matter of law, has disclosed at the very least, a prima facie case- whether or not it is provable is another matter- an offence known to law, namely, an intent to defraud by false pretenses; that is, an intent to defraud the complainant of certain

sums of money by making a false pretense that the weight of chicken delivered was more than that actually delivered, and that the amount delivered was in fact less than that represented on the invoices submitted for payment contrary to section 279 of the Criminal Code.

[144] The court, for good reason, has exercised great restraint in saying anything that may or is likely to prejudice the fair hearing or fairness of any subsequent trial, but the offence being one of defrauding by false pretense as to weight, (assuming such an offence can be proved) what the prosecution will ultimately have to establish among other things, is that the weight of the chicken delivered was not the weight represented by the defendants and as stated on the invoice submitted for payment; that the sums paid for the chicken were not the true worth of it and that the defendants were aware of this fact; and, that with intent to defraud, they attempted to obtain the difference between the falsely pretended and the true price of the weight of the chicken delivered.

[145] Ms. Greenidge has placed great reliance on the case of **R v Sherwood**⁶ to support the prosecution's contention that the averment in the counts in the indictment as to weight, could properly be said to amount to a false pretense. The court thinks that there is a clear distinction to be drawn between the case of **R v Sherwood** and the present case. In **R v Sherwood** there was a contract to supply coal at a certain price per cubic weight. The defendant delivered coal, which he knew weighed less than the agreed weight and fraudulently and falsely pretended that its weight was more than that agreed to be delivered. The defendant produced a ticket showing it to be such weight and alleged that it was weighed at the colliery. The defendant was convicted.

[146] The present case stands in contradistinction to the case of **R v Sherwood**. In the present case, there was no specific contract or agreement to supply any specific weight of the product in question at any specific time. In fact, what can be gleaned

⁶ [1857] 169 ER 997

from the depositions is that the defendants delivered random weight of the product at different times. There was no agreed weight to be delivered on each occasion.

[147] The question of the defectiveness of the indictment arose in two different ways in the course of argument before the court. Separate and apart from the question of the failure to include particulars of the manner in which the consent of the complainant was obtained, and the insufficiency of the statement of particulars as they relate to the statement of facts that amounted to the false pretence, Mr. Hood in his oral argument before the court and made at the invitation of the court, was asked to address the question of the various invoices which formed the subject matter of the counts in the indictment related to defrauding by false pretenses.

[148] The court's invitation to counsel to address the foregoing issue was precipitated by the recognition of the obvious fact that the offences were alleged to have been committed on divers days and by virtue of several invoices, but no particulars were recited in the counts contained in the indictment as to precisely which of the invoices submitted constituted the false pretense. Instead of making each invoice a separate count in the indictment, the indictment merely stated an aggregate amount of the total sum of the invoices.

[149] In the court's view, this had the likelihood of creating a challenge for the defendants to properly plead to the counts. The situation appeared to have been compounded by the fact that Mr. Hood indicated to the court that he has not had sight of these invoices or that the same had not been disclosed to him in the course of the proceedings.

[150] The court heard submissions from counsel on this specific point. In the court's view this particular issue became relevant for the purposes of section 129(5) of the CPC which provides that every count in an indictment shall in general, apply only to a single transaction.

[151] The counts in the indictment each mention "over-invoicing" as the false pretense alleged. However, the mere reference to "over-invoicing" for specific sums over

specific periods of time in the aggregate, in the court's considered view, makes each count in the indictment related to defrauding by false pretense, embarrassing to the extent that the defendants cannot be expected to properly plead to the counts on the indictment. It is clear that the prosecution has alleged "over-invoicing" relative to specific invoices upon which they rely as containing the false statement as to the weight of the chicken delivered. Therefore, it would seem that each invoice ought to have been the subject of a separate count in the indictment.

- [152] It must be remembered as a matter of principle, that particulars are required in order to inform a defendant as to the circumstances, time, place, conduct, and subject matter of the offence which has been alleged against him. Ordinary language is to be employed; the use of technical terms is unnecessary. All that is necessary is that the wording of the indictment be sufficient to indicate to a defendant with reasonable clarity, the occasion and the circumstances of his offending, so that he may be able to know what defense to offer, and should it perchance turn out that he is prosecuted a second time for the same crime, to show that he is being prosecuted for the identical crime.
- [153] Generality of accusation is difficulty of defence. Therefore, accusing a defendant of obtaining the consent of another to pay money with intent to defraud by false pretense by over-invoicing is a typical example of generality of particulars. This would certainly be the case where the prosecution relied on evidence of specific invoices with specific dates and false statements as to weight. In each of the instances of over-invoicing alleged, different sums of money were involved.
- [154] The prosecution seemed to be contending that the defendants knew the true weight of the chicken and their attempt to sell it in excess of its actual weight amounted to defrauding by false pretense. The counts in the indictment, it seems to the court, suggest that the prosecution is impliedly alleging in the statement of the particulars of offence, what the true weight of the chicken was in each instance, that is, the sums which the complainant should have paid to the defendants.

- [155] Therefore, it can only be by dint of guesswork and speculation that the defendants can derive what the difference in payment would have been under each invoice submitted for payment. It is this difference in the amount payable to the defendants according to the weight of the chicken actually delivered, and the weight of the chicken stated in the invoice, that the prosecution alleges that the defendants intended to defraud by false pretense. Generality of accusation is difficulty of defence.
- [156] Given the wording of the various counts in the indictment, it appears that the prosecution is alleging that the true weight and hence the true price payable, has to be arrived at by inference - by making a deduction from the facts as stated in the particulars. Therefore, it cannot be said that the particulars of the offence as stated in the indictment is capable of giving reasonable information of the nature of the charge.
- [157] The general principle is that each count shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act to be proved against him or her, and to identify the transaction referred to in the count. It is for this reason that each count shall, in general, apply only to a single transaction.
- [158] In the court's considered view, the prosecution's failure to properly and clearly set out the particulars of the offence in the manner hereinbefore described, is unlike a situation where through oversight or otherwise, some ingredient which ought to have been but was not included in the statement of particulars, in which case the indictment would not be considered a bad indictment but merely a defective or imperfect one.
- [159] In the present case, the indictment states the offences charged with complete accuracy in the statement of offence, and only the particulars, which merely elaborate the statement of offence are not only incomplete but disclose the commission of no offence known to the law. The court thinks that it makes good

sense that the words “over-invoicing” has no place in the criminal law and could hardly be considered as the unlawful act in the manner contemplated by the Code.

[160] Therefore, assuming that a lack of particulars in the charges contained in the indictment are merely a defect, the indictment is good. However, in the present case, the statement of particulars of the offence charged, fell woefully short of what is required by the CPC and therefore amounts to more than just a mere defect due to error or oversight which rendered the indictment incurable by amendment. In any event, there is the added element that by operation of section 39(2) (c) the counts disclose no offence known to law in light of the alleged facts relied on by the prosecution.

[161] In a nutshell, the prosecution’s statement of the particulars of the offence of defrauding by false pretense in the indictment, does not disclose either the false pretense or the manner in which the intent to defraud arose. The mere averment relative to “over-invoicing” in the particulars of the offence is insufficient to describe the false pretense alleged. In other words, it leaves one to imply the nature of the false statement or representation as to an existing fact that amounted to a false pretense and the manner in which the defendants intended to defraud.

[162] Notwithstanding the foregoing observations, the court found it appropriate to examine the provisions of section 133(2) of the CPC which provides that:

“No count which charges any false pretense, or any fraud, or any attempt or conspiracy by fraudulent means shall be deemed insufficient because it does not set out in detail in what the false pretenses, or the fraud, or the fraudulent means consisted:

Provided that the Court may, if it is satisfied as aforesaid, order that the prosecutor shall furnish a particular of the above matters or any of them.”

Even if the court were to order that the prosecution provide particulars of those matters which are absent from the counts in the indictment, the hurdle relative to section 39(2) (c) remains insurmountable.

[163] The Court's jurisdiction to quash an indictment is founded in section 141 of the CPC which provides under the heading "Objection of substance to indictment" as follows:

- (1) No objection to an indictment shall be taken by way of demurrer, but if an indictment does not state in substance an indictable offence, or states an offence not triable by the Court, the accused may move the Court to quash it or, in arrest of judgement.
- (2) If the motion is made before the accused pleads, the Court shall either quash the indictment or amend it, if it thinks that it ought to be amended.
- (3) If the defect in the indictment appears to the Court during the trial, and the Court does not think fit to amend it, it may, in its discretion, quash the indictment, or leave the objection to be taken in arrest of judgement.
- (4) If the indictment is quashed, the Court may direct the accused to plead to another indictment when called on at the same sitting of the Court."

[164] The purport and effect of the foregoing provision of the CPC is that it confers a discretion on the court. In the present case, the provisions of section 141(1), 141(2) and 141(4) are instructive to the present discussion.

[165] The question which looms large in the present proceedings is whether the defective indictment can be cured by amendment or the furnishing of particulars by the prosecution. In the court's view, the defendants are entitled to such particulars which would put them in a position to defend the case or understand the nature of the case which they have to defend.

[166] The court has noted that there has been no formal request made by the defendants for sufficient particulars of the counts in the indictment charging defrauding by false pretenses. Perhaps this was the case for strategic reasons. In any event, for the defendants to now complain about the insufficiency of details or particulars may be suggestive of an acknowledgement of the existence of an offence that is known to law, but only that the particulars relative to it are insufficiently stated in the indictment before the court. In the court's view, a request for sufficient details or particulars is inconsistent with a claim that a count in an indictment as laid, discloses no offence known to law.

- [167] A statement of the offence is that part of an indictment that is separately and distinctly stated from the particulars of the offence. Therefore, if what the defendants are attempting to say is that the defect or insufficiency of particulars had made the offence unknown to law, it has already been stated in this judgment that this is not the case, as a mere irregularity cannot invalidate a count in an indictment. As has already been stated, whereas in the present case there is an insufficiency of particulars, that is, a matter which renders the indictment defective cannot render it bad in law.
- [168] In the court's opinion, it would have been a very simple matter for the defendants to request that the indictment be amended by adding the particulars as the prosecution ought to be willing to furnish and thought necessary. However, it does not appear that any such request was made as clearly this would have been inconsistent with the defendants' application before the court to quash the indictment on the basis that it discloses no offence known to law.
- [169] Ultimately, the court finds that the counts in the indictment relative to the offence of defrauding by false pretense contain, in substance, a statement that the defendants have committed some offence specified therein; however, the counts are insufficiently worded to give the defendants reasonable information as to the acts to be proved against them, and to identify the transactions referred to therein.
- [170] The court concludes that the counts in the indictment relative to the offence of defrauding by false pretense disclose no offence known to law and is therefore a nullity and ought therefore to be quashed. Assuming that the court is mistaken in its decision, then clearly the impugned counts are incurable by amendment. A simple amendment would not suffice in the circumstances. What will be required is the filing of an indictment with properly worded counts in light of the observations already made by the court. In any event, it stands to reason that given the discussion which the court has embarked upon as to whether the conduct alleged on the part of the defendants discloses the commission of the subject offence, it would be difficult, in

the court's humble view, for the prosecution to consider the filing of a new indictment in the matter.

[171] In the premises, and for the reasons already highlighted by the court in this judgment, the court orders as follows:

1. The defendants' application relative to the constitutional impropriety in charging an offence unknown to law as being contrary to section 8(4) of the Constitution is dismissed.
2. The indictment filed herein on 8th March 2024 is quashed.
3. In the event that the court has erred in its decision to quash the indictment, then in any event, the counts in the indictment relative to the offence of defrauding by false pretense cannot stand in their present form. It would require a substantial amendment which would not be efficacious given the procedure for amending an indictment. It is entirely a matter for the Director of Public Prosecutions to file a new indictment. However, the Director of Public Prosecutions would be ill advised to do so given the observations which the court has made as a matter of law and as it pertains to the provisions of section 39(2) (c) of the Criminal Code.

Shawn Innocent
High Court Judge

By the Court

Registrar