

IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CASE NO: ANUHCR2017/0065

BETWEEN:

THE QUEEN

and

[1] HARRY JOSIAH

[2] GENEVIEVE PHILLIP

Appearances:

Mr. Andrew O’Kola and Mr. Cedric Dyer, Counsel for the Crown
Mr. Dane Hamilton QC, Counsel for the Defendants

2022: February 23rd, 24th, 25th, 28th

2022: March 1st, 2nd, 4th

JUDGMENT/ VERDICT

[1] By an indictment filed by the D.P.P on 29th March 2018, the accused Harry Josiah and Genevieve Phillip were charged with several counts of corruption and forgery contrary to the ***Prevention of Corruption Act*** No. 21 of 2004 and the ***Forgery Act***, Cap181 of the laws of Antigua and Barbuda.

[2] At the close of the case for the Crown, counsel for the accused, Mr. Dane Hamilton Q.C submitted that there was no case to answer for the accused persons in relation to any of the counts on the indictment. The thrust of Mr. Hamilton’s submission was that the Crown failed to establish an essential element in relation to each count, namely that there was no proof that at the material time that the offences were allegedly committed, the vehicles were the property of the Antigua and Barbuda Transport Board.

[3] The test to be applied when a submission of no case to answer has been made is succinctly set out in the celebrated case of **R v Galbraith**¹ and reiterated in the later case **Taibo (Ellis) v R**²

[4] In **Galbraith** (supra) Lord Lane said at page 1062 e-g:

(1) **“If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.”**

(2) The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of inherent weakness or vagueness because it is inconsistent with other evidence.

(a) Where the judge comes to the conclusion that the Crown’s evidence taken at its highest, is such that a jury could not properly convict on it, it is his duty on a submission being made to stop the case. (Emphasis mine).

(b) Where however the Crown’s evidence is such that its strength or weakness depends on the view to be taken of a witness are generally speaking within the province of the jury and where one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

“There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.”

Mr. Hamilton relied on the second limb of **Galbraith** in support of his submission of there being no case to answer.

Background

[5] The accused, Harry Josiah was the General Manager and the C.E.O of the Antigua and Barbuda Transport Board (hereinafter referred to as the Board) from 1st February 2005 to August 2014. The Board was enacted by parliament as No.13 of 1995. The Board is a body corporate within the meaning of the Act. Under and by virtue of the provisions of the **Transport Board (Amendment) Act** No. 22 of 1988, the Board is given the responsibility to manage and administer efficiently and in a businesslike manner

¹ [1987] 2 All E.R 1060; [1981] 1 WLR 1039

² (1996) 48 WIR 74.

ground transportation of persons and goods in Antigua and Barbuda and all other matters destined in the Board.

[6] Harney Motors Ltd is a private company in the business of importing and selling used and new vehicles to businesses and private individuals. The Board is one of their customers. Harney Motors established a credit account for the Board. The company also offers financing to individuals for the purchase of motor vehicles.

[7] Sometime in 2009 at the request of Harry Josiah, Harney Motors loaned twelve (12) vehicles to the United Progressive Party for the purpose of their election campaign. Amongst the vehicles loaned were four (4) 2000 model Toyota Corolla and two (2) Rav 4.

[8] All vehicles were returned to Harney Motors save the six (6) vehicles hereinbefore mentioned. The Toyota Corollas bore number plates A31746, A31745, A30966 and A60006. The two Rav 4 bore VIN numbers 2818 and 2812. These six vehicles are the subject matter of the counts on the indictment.

[9] It was the Crown's case that the 6 vehicles were sold and/or transferred to the Board, thus becoming the property of the Board. Harry Josiah in the performance of his duties, obtained the property of the Board and in contravention of the provisions of the **Prevention of Corruption Act**, transferred the said vehicles to the persons named in the indictment. Further, Harry Josiah by a forged instrument, transferred Toyota Corolla bearing VIN number 4136 and Toyota Rav 4 bearing VIN number 2812 to the named persons on the indictment in contravention of the **Forgery Act**.

[10] Having regard to the Crown's position in the indictment that the vehicles, the subject matter of the counts, were the property of the Board. It is necessary to show how vehicles are acquired by the Board. The Board must first obtain approval from the Tenders Board to effect the purchase of a vehicle. The Board would obtain customs warrant from Harney Motors, which will then be signed off by the Minister or Permanent Secretary to have the duties waived. The customs warrant is then returned to the Customs Officer at the Harney Motors bond. That will facilitate the removal of the vehicle from the bonded warehouse. The Board would then affix their registration plates and take possession of the vehicle.

[11] Amongst the witnesses called were the following:

- (1) Ewart Harney testified that he is the Managing Director of Harney Motors Ltd;
- (2) Richard D' Ornellas is the Financial Controller of the company and has worked with the company for the past thirty-two (32) years;
- (3) Leslie Barnes is a Salesman at Harney Motors;
- (4) Abelard Reis is the Hire Purchase manager for Harney Motors;
- (5) Sargent Marlon Proctor (retired), the investigator; and
- (6) Hubert Jarvis is the present General Manager at the Board.

Counts 1, 2 and 3

[12] These counts all related to Toyota Corolla bearing VIN number AE1105204136, and accordingly they were considered together.

[13] The documents tendered in relation to counts 1 and 2 showed that the vehicle was insured and registered in the name of Terrence Josiah during the period in both counts, that is to say, during the period of 1st to 31st December 2010.

[14] The Certificates of Insurance dated 3rd April 2009 to 2nd April 2010 and 23rd December 2010 to 2nd December 2011, tendered by the Crown at pages 53 and 59 of bundle 1 showed Terrence Josiah as the policy holder (see too document at page 55). By document dated 23rd December 2010 and tendered by the Crown at page 63 Bundle 1, the document evinced that the said vehicle was registered in the name of Terrence Josiah.

[15] In relation to count 2, the Crown tendered an Antigua and Barbuda Transport Board Vehicle Registration Application dated 23rd December 2010 in the name of Terrence Josiah. The document bore a signature purporting to be "Harry Josiah for T. Josiah".

Count 3

[16] This count related to the same Toyota Corolla bearing VIN number AE110504136 allegedly transferred to Bernard Nanton by virtue of a forged instrument. In his written statement Bernard Nanton said that

sometime in October 2011, he went to Harney Motors and saw a used Toyota vehicle on the northern side of the yard. There was no number plate on the vehicle. He spoke to Abelard Reis, the Higher Purchase Manager at Harney Motors who told him the vehicle was being sold for \$18,000 EC with an additional \$150 EC for change of ownership and registration plates. He secured a loan from the Police Credit union to purchase the vehicle. The loan was approved on 15th December 2011, and he collected the cheque and paid Harney Motors.

[17] The Crown tendered into evidence the following documents:

- (1) a Used Vehicle Sale Proposal Form (see bundle 1 page 64). It was signed by Leslie Barnes, a salesperson and Dyna Harney who was the authorized signatory for Harney Motors;
- (2) a copy of the cheque from the Police Credit Union;
- (3) the Certificate of Insurance with the commencement date being 15th December 2011, and expiring date 14th December 2018; and
- (4) the Change of Ownership (see page 70 of Bundle 1).

[18] Additionally, the evidence of Abelard Reis in his deposition stated that he recalled a 1998 model Toyota Corolla with VIN number AE1105204136 and registration number A34900 was sent back to Harney Motors by Harry Josiah to be sold for the Board. He further said that sometime before the 15th of December 2011, Mr. Bernard Nanton told him that he saw the car in the lot and inquired of him as to the cost. He told Mr. Nanton that the car was being sold for \$18,000. That price was fixed by Harney Motors after evaluating the car. He also recalled preparing a Use Vehicles Sale Proposal for Mr. Nanton to enable him to get a loan to purchase the car. Mr. Nanton was successful with his loan application and later returned to the office with a cheque for \$18,150.00EC. The extra \$100 was for the number plates and \$50 was for the change of ownership.

[19] Further to his evidence, a letter was sent to the Board on 15th December 2009. The letter was signed by Abelard Reis on behalf of Harney Motors, Harry Josiah was advised as follows:

“Please be advised that Harney Motors Ltd, no longer have interest in the 4 following Toyota Corolla vehicles; A60006 with VIN number NZE1210001752, A31745 with VIN number 3003286 and A31746 with VIN number 3006304.”

[20] In his witness statement, Richard D' Ornellas said at page 9:

"That sometime after the general election in March 2009, Harry Josiah called the office and informed us that the Board will be purchasing the four vehicles the United Progressive Party used in the election campaign. In December 2009 the sale of the four vehicles was completed and delivered at the same time. On Wednesday 4th March 2015 the police showed him a letter dated 15th December 2009. The letter was addressed to the Board from Harney Motors indicating that Harney Motors no longer had interest in the Toyota Corolla vehicles previously mentioned".

[21] The evidence relating to count 3 runs contrary to the evidence in support of counts 1 and 2. If the vehicle was the property of Harney Motors during the period 1st to 31st December 2011, then it is unlikely that Terrence Josiah acquired the said vehicle from Harney Motors in 2010. On the basis that he did acquire the vehicle in 2010 from Harney Motors, then the sale to Nanton ought to have been from Terrence Josiah to Nanton. The court wishes to highlight that there is no evidence that the credit union cheque is a forgery, nor was the evidence of Bernard Nanton and/or Abelard Reis challenged on this issue.

[22] In light of the evidence relating to counts 1, 2 and 3, and upon further analysis of same, the court is now of the view that it fell into error in upholding the no case submission in respect of counts 1, 2 and 3.

Counts 4 and 5

[23] These counts were dealt with together as the Crown said they were in the alternative. The court accordingly addressed its mind to count 4 and it was therefore left to the Crown to withdraw count 5. This count related to Toyota Rav 4 motor jeep bearing VIN number ACA20002812. The offence was alleged committed during the period between 1st and 30th June 2010. The Crown produced the following:

- (i) Used Vehicle Sales Proposal Form dated 21st May 2010 from Harney Motors. The purchaser's name on that document Harry Josiah. See bundle 1 at page 77; and
- (iii) Certificate of Insurance issued 21st May 2010 in which Harry Josiah is described as the policy holder. The duration of the insurance is 21st May 2010- 20th May 2011. The Antigua and Barbuda Transport Board Vehicle Registration Application bearing dated 10th June 2010 and the owners name Harry Josiah/Alexia Josiah.

[24] In light of the above, the Crown failed to satisfy the court that during the period referred to in the indictment the vehicle was the property of the Board.

Count 6- Causing property transfer by virtue of a forged instrument.

[25] An essential ingredient to establish a prima facie case for this count would be evidence of a forged instrument. The Crown alleged that Harry Josiah transferred vehicle VIN number ACA20002812, to himself and Alexia Josiah by virtue of a forged instrument namely, a forged Antigua and Barbuda Transport Board Motor Vehicle Registration Application dated 10th June 2010. The alleged forged instrument relied upon bore the signature of Harry Josiah.

[26] The essential feature of a false instrument in relation to forgery is that it is an instrument which "tells a lie about itself", in the sense that it purports to be made by a person who did not make it, or otherwise purports to be made or altered in circumstances in which it was not made or altered³.

[27] In applying this principle, the court held the view that in the absence of a forged instrument the count failed. Accordingly, the submission was upheld.

Count 7

[28] This count was related to Toyota Corolla VIN number NZE1213007379. To establish a prima facie case, the court had to be satisfied that there was evidence that between the period 1st and 30th December 2009, the said vehicle was the property of the Board.

[29] In his witness statement, Leo Erskine said, inter alia:

"Sometime early in 2009, I saw several white 2000 model Corollas parked on the south side of the parking lot of Transport Board at Paynters ... I then went to the manager Mr. Harry Josiah and told him I heard the cars were to be sold. I told him I was interested in one of the cars and he should keep me in mind.... I kept checking back with him and he eventually told me to go and choose the one I was interested

³ R v Hopkins and Collins (1957) 41 Cr. App.R. 231.

in. I chose A30866. I received a letter from him that the value of the car was \$23,900.00. I then went on the 3rd of April 2009 and joined my name to the insurance for the car A30866 at Anicol Insurance”.

“In December 2009 I completed my arrangement with the accountant as to how I will pay for the car. The accountant at the time was Mrs. Burleigh and during the conversation with her I told her I could pay \$650.00 EC each month and she arranged for that amount to be deducted from my salary. I had the change of ownership for the car done on 17th December 2009, and I registered the car in my name the same day. The change of ownership form was written by Ms. Kimra Abbot and I signed my name on the form as the buyer”.

[30] Leo Erskine on 1st April 2010 re-registered the car jointly with his sister Ewlyn Williams. He also changed the number plate to A1629.

[31] The Crown tendered the following documents in support of this count:

- (i) Change of ownership form – (see page 9 Bundle 1). The form is signed by Leo Erskine as purchaser. Under the owner’s name section and owner’s signature section, no signature appears. However, there was a notation which read “attached December 17, 2009” and a signature. There was evidence that the signature was that of Harry Josiah.
- (ii) Vehicle Registration Application Form (see page 8 Bundle 1). The owner is Leo Erskine, and it is dated December 17th, 2009.
- (iii) Certificate of Insurance was in the name of Leo Erskine from 3rd April 2010 to 2nd April 2011. That document did not state the previous owner of the vehicle (see page 11 Bundle 1).
- (iv) Letter from Harry Josiah to Leo Erskine dated 4th March 2009. This letter is unclear as to the ownership of motor vehicle A30866. In the court’s view, while the document does not state that the vehicle is the property of the Board, the language seemed to suggest that Harney Motors still retained ownership. That by itself was not sufficient to satisfy the court

that Harry Josiah had acted corruptly, in the transfer of the said vehicle (see page 12 Bundle 1).

(V) Harney Motors Used Vehicles Invoice dated 12th November 2009. This invoice was signed by Leslie Barnes, salesperson, and the authorized signature was that of Dyna Harney. However, this invoice is not proof of ownership of the vehicle by the Board.

[32] In light of the above, the court was not satisfied that a prima facie case had been made out that at the material time between 1st and 31st days of December 2010 the vehicle was the property of the Board.

Count 8

[33] This count alleged that on 3rd June 2010, Harry Josiah corruptly transferred Toyota Corolla VIN number NZE1213006304 the property of the Board to Hudson Joseph. In support of this count, the following were placed before the court:

- (i) Vehicle Registration Application Form. This application was dated 6th January 2009, and bore the name of the owner as Harney Motors (see Bundle 1 page 5)
- (ii) Motor vehicle Examiners Certificate dated 6th January 2009 in which Harney Motors described as the owner.
- (iii) Change of ownership form dated 3rd June 2010. In that document Hudson Joseph is described as the purchaser and he signed it. In the space for the owner, there is no person or entity named. However, there is a notation "see letter attached". That was a direct reference to the letter 15th December 2009 and signed by Abelard Reis.
- (iv) Vehicle Registration Application dated 2nd June 2010 wherein Hudson Joseph is named as owner. See Bundle 1, page 20

- (v) Certificate of Insurance. This insurance carried a date of commencement 1st January 2010 to 14th October 2010 and the VIN number is the same as referred to in the particulars of the offence.

[34] In light of the foregoing, the court was not satisfied that the Crown had made out a prima facie case that the Board was the owner of the said vehicle at the material date.

Count 9

[35] This count alleged that on 17th December 2009, Harry Josiah without lawful authorization so to do, or approval, corruptly transferred motor vehicle VIN number N2E1213003286 to Kimra Abbot. She gave two (2) witness statements. They were tendered into evidence by agreement of the Crown and defence counsel.

[36] Ms. Abbot was the Personal Assistant to Harry Josiah during the period of 2005 to 2011. She said, inter alia, that she told Harry Josiah of her efforts to get a car overseas. Sometime in December 2009, Harry Josiah told her that Harney Motors had some Corollas and if she was interested, she could purchase one. Harry Josiah told her she could pay through the Board. She later saw four Toyota Corollas parked on the eastern side of the property at Paynters. Toyota Corolla License number A31745 was handed over to her by Harry Josiah.

[37] She advised Harry Josiah that she would not be able to commence payments until January 2010. The monthly payments were \$500.00 EC. She filled out a change of ownership and vehicle registration form and left the space for owner's name and signature blank. She returned the form to Harry Josiah.

[38] The following documents were before the court:

- (i) Change of ownership form dated 17th December 2009 and signed by Kimra Abbot. The space for owner's name and signature is blank but a notation on the side read "See attached 17th December 2009.

- (ii) Vehicle registration application bearing name of owner Kimra Abbot. That document was dated 17th December 2009.
- (iii) Letter of December 15, 2009, signed by Abelard Reis on behalf of Harney Motors to the Board. In that letter VIN number N2E1213003286 is scratched. There was evidence that the said VIN was erroneously inserted.
- (iv) Certificate of Insurance in the name of Kimra Abbot for the period 28th January 2010 to 2nd April 2010. (See Bundle 1 pages 29, 30, 31)

[47] There was no evidence on any of the above documents purporting to establish that the vehicle was the property of the Board on 17th December 2009. Accordingly, the court was not satisfied that there was evidence upon which the accused could be called upon.

Counts 10 and 11

[39] The Crown accepted that there could not be a conviction on both counts as they were alternative counts.

Accordingly, the court addressed its mind to the particulars of the offence as set out in count 10.

[40] The particulars alleged, inter alia, that Harry Josiah between 6th January 2009 and 3rd April 2009, for the purpose of obtaining property to wit, one Toyota Corolla VIN NZE1210001752 the property of the Board for Genevieve Phillip. There was no evidence that the vehicle was the property of the Board at the material time.

Count 12

[41] Aiding Corruption contrary to **section (3) 2 of the Prevention of Corruption Act**. Several documents went into evidence in relation to motor vehicle VIN number NZE1210001752. The documents are as follows:

- (i) Certificate of Insurance- Policy Holder Genevieve Phillip. Commencement date 15th December 2009 to 15th December 2010;
- (ii) Vehicle Registration Form; dated 16th December 2009;

- (iii) Change of ownership Form dated 16th December 2009. The purchaser's name is Genevieve Phillip, and the form is signed by her. There is no name or signature on the space for same but there is a stamp "APPROVED "and a signature at the side. That signature is said to be that of Harry Josiah, issued on 6th January, 2009; and
- (iv) Witness statement of Sean Cenac, Permanent Secretary of the Ministry of Finance and Corporate Governance. He said at page 106 "**Should a statutory body wish to dispose of an article, it is governed by section 28 and 29 of the act, wherein any surplus or unserviceable asset, with an original cost greater than \$10,000.00 should be disposed of only after submission of a report and approval is given by the Tender's Board**".

[42] In the Question and Answer conducted by Sgt. Proctor, Genevieve Phillip said at page 47 that she had the vehicle in her possession since 2009 and it was in her name in December 2009. She entered into a hire purchase agreement with Harney Motors in 2015 for the said vehicle.

[43] In light of the above, the court was not satisfied that Genevieve Phillip aided Harry Josiah to improperly use for her benefit the said Toyota Corolla.

[44] Based on the evidence before the court in relation to this count, the court was not satisfied that at the material time the vehicle was the property of the Board. In any event, having regard to the language of the count 12, Genevieve Phillip could not have been the aider and abettor.

[45] For the reasons set out above, the court made orders accordingly.

Stanley John

High Court Judge

By the High Court

Registrar

