

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANGUILLA

AXAHCRA2016/0001

BETWEEN

JOSEPH BRICE

Appellant

and

REGINA

Respondent

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mde. Gertel Thom
The Hon. Mr. Gerard St.C Farara, QC

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Joseph Brice in person
Ms. Erica Edwards, Senior Crown Counsel and Mr. Ivor Greene, Senior Crown Counsel for the Respondent

2020: January 28;
April 8.

Criminal appeal — Appeal against conviction — Theft contrary to section 242 as provided for by section 248(b) of the Criminal Code of Anguilla — Money credited to appellant's bank account by electronic transfer — Debiting of company's bank account and corresponding crediting of appellant's bank account — Charge of theft of credit balance to be proffered in such circumstances - Principles of R v Preddy - Whether learned judge erred in failing to uphold the no case submission — Ineffective assistance of counsel at trial - Whether conduct of counsel undermined safety of conviction

Mr. Joseph Brice ("Mr. Brice") was a director of a licensed trust management company called Private International Trust Corporation ("PITCO") which was responsible for the management of Regency Holdings Limited ("Regency"), an international business corporation in accordance to the terms of a Management Agreement. Regency had

substantial monies to its credit, in a bank account held at Fortis Bank Curacao ("Fortis Bank") and on which Mr. Brice had signing rights. Mr. Brice managed the bank account based on written instructions sent to him by Leonard Reyneke and Associates, an accounting and auditing firm in South Africa on behalf of Regency. When Mr. Brice provided trust management services to Regency, he was remunerated based on written instructions from Mr. Leonard Reyneke ("Mr. Reyneke").

Needing money for his personal use, Mr. Brice sent an email to Mr. Reyneke requesting that Mr. Reyneke ask the principals of Regency to loan him the sum of US\$950,000.00 for 8 weeks. By the time Mr. Reyneke read the email, Mr. Brice had already instructed Fortis Bank to debit Regency's account and credit his account in the sum of US\$950,000.00. Upon reading the email, Mr. Reyneke contacted Mr. Brice and indicated that there was no approval for the withdrawal of the monies and requested that Mr. Brice immediately return the monies that he had withdrawn from Regency's account. Mr. Brice failed to do so and continued to use the monies for his own use. As a result, Regency and Mr. Reyneke made reports to the police in Anguilla. Mr. Brice was arrested and charged with several counts of money laundering and theft.

He was charged and tried for money laundering and the theft of the sum of US\$950,000.00 contrary to section 242 as provided for by section 248(b) of the Criminal Code of Anguilla (the "Criminal Code") and was convicted and sentenced. Mr. Brice successfully appealed to the Court of Appeal against that conviction and sentence. The Court of Appeal ordered him to be retried. On his retrial, the indictment that was presented by the Crown charged him with several counts of breaches of the Proceeds of Criminal Conduct Act and theft. The judge directed the jury to acquit him of all charges under the Proceeds of Criminal Conduct Act and he was tried only on the count of theft. During his retrial, his then counsel made a no case submission relying on the principle in **R v Preddy** and the submission was overruled. He was convicted and sentenced to 18 months' imprisonment with time on remand of 2 weeks and 3 days taken into account.

Mr. Brice appealed against his conviction and complains that his counsel at the retrial did not competently represent him and relatedly that the learned judge erred in failing to uphold his no case submission. He contends that the cumulative effect of both breaches undermines the safety of his conviction. Two main issues therefore arise for this Court's determination: (i) whether the learned judge erred in law in failing to uphold his no case submission; and (ii) whether the conduct of Mr. Brice's counsel at the retrial was such that it undermined the safety of his conviction.

Held: allowing the appeal and quashing Mr. Brice's conviction, that:

1. Money in a bank account represents a credit balance. A credit balance represents a debt owed by a bank to an account holder. Property in the form of credit balance is the customer's right, as creditor, to recover the debt from the bank. The cases of **Preddy**, **Hilton** and **Darroux** provide the guiding principle and make it patently clear that in circumstances that are analogous to the acts of the appeal at bar, the charge of stealing the credit balance shall be proffered as distinct from a charge of

theft of the actual sum of money in order for it to be sustainable. Failure to do so is fatal.

R v Preddy [1996] AC 815 applied; **R v Hilton** [1997] 2 Cr App R 445 applied; **Darroux v The Crown** [2018] EWCA Crim 1009 applied.

2. In these circumstances, Mr. Brice was charged and tried for theft of the sum of US\$950,000.00 as distinct from theft of the credit balance in accordance with the **Preddy** and **Hilton** decisions. The evidence that the Crown led was incapable of establishing a prima facie case that Mr. Brice had stolen the money. If at all, the charge, based on **Preddy**, ought to have been in relation to theft of the credit balance. Accordingly, the learned judge should have upheld the no case submission in light of this evidential difficulty since no evidence had been led to substantiate an essential element of the offence for which Mr. Brice had been tried, namely the actus reus of theft of US\$950,000.00, had not been proven.

R v Preddy [1996] AC 815 applied; **R v Hilton** [1997] 2 Cr App R 445 applied; **Darroux v The Crown** [2018] EWCA Crim 1009 applied.

3. The general rule is that not every deviation of counsel from standards of professional conduct during the conduct of the trial will result in a conviction being quashed on appeal. If the appellate court is of the view that, notwithstanding counsel's default, the trial was not affected and the verdict would have inevitably been the same, the conviction may stand. However where counsel's conduct was so egregious, the court may take the view that there has been a denial of due process, thereby undermining the safety of the conviction.

Boodram (Ann-Marie) v The State (2001) 59 WIR 493 applied; **Bethel v The State (No. 2)** (2000) 59 WIR 451 applied.

4. An appellate court must approach complaints about counsel's incompetence, and its effect with a healthy skepticism. Where it has been demonstrated that counsel's failures were of a fundamental nature, the court must proceed with great care before it concludes that the verdict would have inevitably been the same. Whilst not making a finding of incompetence against Mr. Brice's counsel, there is no doubt that the representation provided by his counsel could have been more helpful and enhanced. The complaints against counsel are serious and the applicable legal principles of **Preddy** should have been canvassed in more detail and with greater clarity in support of the no case submission.

Boodram (Ann-Marie) v The State (2001) 59 WIR 493 applied; **Bethel v The State (No. 2)** (2000) 59 WIR 451 applied.

5. On a no case submission, the essential question that the judge has to determine is whether a jury, properly directed, can convict on the evidence that the Crown has

led. Essentially, the judge is required to determine whether the prosecution has led evidence to establish a prima facie case that requires the defendant to answer. The critical question in the present appeal is whether the safety of Mr. Brice's conviction has been undermined given the totality of the circumstances. It is clear, based on the Crown's evidence and the principles in **R v Preddy**, that it would have been impossible for the jury, properly directed, to have convicted Mr. Brice of theft of US\$950,000. Therefore, it is evident that the learned judge erred in rejecting the no case submission since an essential element of the offence was not borne out by the Crown's evidence, namely the unlawful taking of US\$950,000 as distinct from the credit balance.

R v Galbraith [1981] 2 All ER 1060 applied.

JUDGMENT

Introduction

- [1] **BLENMAN JA:** This is an appeal by Mr. Joseph Brice ("Mr. Brice") against his conviction. At the heart of his appeal are the allegations that his then counsel did not competently represent him and this undermined the safety of his conviction. Relatedly, he contends that the learned trial judge erred in failing to uphold his no case submission. He complains that the effect of both, taken singularly or cumulatively, undermine the safety of his conviction. He therefore urges this Court to quash his conviction. His appeal is strenuously resisted by the Crown.

Background

- [2] Mr. Brice was a director of a licensed trust management company called Private International Trust Corporation ("PITCO") which was responsible for the management of an International Business Corporation called Regency Holdings Limited ("Regency").¹ Regency had substantial monies to its credit in a bank account held at Fortis Bank Curacao ("Fortis Bank") and on which Mr. Brice had signing rights. Over the years, he managed the account based on written instructions that were sent to him by Leonard Reyneke and Associates, an accounting and auditing firm in South Africa on behalf of Regency. In a word,

¹ Mr. Brice is also a qualified professional who holds several degrees including a law degree. He indicates that he is also the holder of a Master of Laws degree even though he is not a lawyer.

Mr. Brice's company PITCO provided management trust services to various offshore companies for a fee. Specifically in relation to Regency, when PITCO provided services, it was remunerated based on written instructions from Mr. Leonard Reyneke ("Mr. Reyneke").

- [3] Mr. Brice, needing money for his personal use, sent an email to Mr. Reyneke requesting that Mr. Reyneke ask the principals of Regency to loan him (Mr. Brice) the sum of US\$950,000.00 for 8 weeks. Between Anguilla and South Africa, there is a time difference of 6 hours. As a consequence, Mr. Reyneke did not read the email until the following day, by which time Mr. Brice had already instructed Fortis Bank to debit Regency's account and credit his account in the sum of US\$950,000.00.
- [4] Upon reading the email, Mr. Reyneke immediately contacted Mr. Brice and indicated that there was no approval for the withdrawal of the monies. He requested Mr. Brice to have the monies that he had withdrawn from Regency's account immediately returned to its account, which he failed to do. Consequently, Regency and Mr. Reyneke made reports to the police in Anguilla. Mr. Brice was arrested and subsequently several criminal charges were laid against him. He eventually repaid Regency its monies.
- [5] Mr. Brice was charged with several counts of money laundering and theft. He was tried and convicted and sentenced for the theft of the sum of US\$950,000.00 contrary to section 242 as provided for by section 248(b) of the **Criminal Code of Anguilla**² (the "Criminal Code"). He successfully appealed to the Court of Appeal against that conviction and sentence. The Court of Appeal ordered that he be retried.
- [6] On his retrial, the indictment that was presented by the Crown charged him with

² Cap. C140 of the Revised Statutes of Anguilla.

several counts of breaches of the **Proceeds of Criminal Conduct Act**³ and theft contrary to section 242 as provided for by section 248(b) of the **Criminal Code**.

[7] At his retrial, he had changed his counsel and retained the services of Mr. Marcus Foster ("Mr. Foster") who is now deceased. The appellant indicated that at the conclusion of the retrial, the learned judge directed the jury to acquit him of all of the charges under the **Proceeds of Criminal Conduct Act**. He was therefore tried only on the count of theft. A different strategy was adopted by Mr. Foster at his retrial. Indeed he made a no case submission at the close of the prosecution's case. This however was overruled. The trial continued and Mr. Brice was convicted of theft. He was sentenced to 18 months imprisonment with time on remand of 2 weeks and 3 days taken into account.

[8] He filed a number of grounds of appeal which were amended several times without objection from the Crown.

Grounds of Appeal

[9] Mr. Brice has filed 11 extensive grounds of appeal some of which have sub-grounds. It is unnecessary to recite them in detail due to the fact that during his oral presentation, for which he utilised comprehensive speaking notes, the issues that arose for this Court's determination were crystallised. Accordingly, it suffices to say that, in the main, he criticises the conduct of the trial by the judge and the legal representation that he had received from Mr. Foster. In essence, they all revolve around the mannerism and the way in which his counsel advanced the no case submission and the failure of the judge to uphold it.

Issues on Appeal

[10] From the grounds of appeal and oral arguments, two main issues emerged:

(a) Whether the learned judge erred in law in failing to uphold his no case

³ As saved by section 4(1) of Schedule 5 of the Proceeds of Crime Act Revised Statutes of Anguilla, Cap P98.

submission; and

- (b) Whether the learned counsel's conduct at trial or dereliction of duty undermined the safety of his conviction.

Appellant's submissions

[11] Central to Mr. Brice's appeal is the no case submission made by Mr. Foster on his (Mr. Brice's) behalf. Mr. Brice's broad complaint is that Mr. Foster ineffectively presented the no case submission and thereby undermined the safety of his conviction. Mr. Brice adverted this Court's attention to a number of matters which he said are borne out in the transcript, and to his instructions to counsel, as the bases of his complaints. Regrettably, Mr. Foster died before the hearing of the appeal and therefore no evidence was provided to this Court on his behalf to give clarity to or to counter most of Mr. Brice's complaints in relation to him. Of relevance, is the fact that Mr. Brice told this Court that he instructed Mr. Foster that he should make a no case submission at the end of the prosecution's case on an issue which he said was overlooked at the first trial. During his oral presentation,⁴ Mr. Brice sought to impress upon this Court that he told Mr. Foster that he wished to avoid the mistakes, that in his view, were made in the first trial. He said that this required intensive consultation and discussion on trial strategy. He said that he told Mr. Foster that the no case submission should feature the principles that were enunciated in **R v Preddy**.⁵ In Mr. Brice's view, **Preddy** was relevant authority for his case. He said that, **Preddy** establishes that in circumstances similar to those under which he was convicted, it is not possible for the prosecution to prove an essential element of the offence, namely that, the money taken was the "property belonging to another".

[12] Mr. Brice posited that Mr. Foster did not properly understand **Preddy**, which, in his view, was at the heart of the no case submission, and therefore did not adequately present it to the judge. He pointed to various portions of the transcript of

⁴ Mr. Brice read extensively from his notes and the court indulged him since he was a litigant in person.

⁵ [1996] AC 815.

proceedings to substantiate his complaint, including one in which Mr. Foster is recorded as saying:

“In **Preddy**, Lord Goff noted that the cheque ‘D’ obtains does belong to ‘V’ [the virtual complainant] but said that ‘D’ would not be guilty of stealing it because he had no intention permanently to deprive V if he knew the cheque form would have, after representation be returned via his bank (or at least available for V’s collection. Since the house has not required whether the defendant might be guilty of obtaining this item of property, it is submitted that the court of Graham treated it as ratio and in Clark held that it was bound by that decision. So present of a cheque cannot be stolen or obtained.”⁶

[13] He stated that Mr. Foster characterised **Preddy**, wrongly, as laying out the ingredient of ‘intention permanently to deprive’. His position was that **Preddy** was not a case about ‘intention’; rather, it was a case on the issue of property ‘belonging to another’. Mr. Brice, however, acknowledged that the learned judge urged Mr. Foster to explain to the court the substance of his submission and invited him to explain the principles in **Preddy**. He said that the judge proceeded to keenly engage defence counsel on the multiple issues of intention, dishonesty and appropriation without the necessary compartmentalisation that these separate issues required. However, in Mr. Brice’s opinion, none of this discussion bore any relation to the issues in **Preddy**. Mr. Brice then pointed to one portion in the transcript where, he says that, Mr. Foster, only after being prompted several times, declared as follows: “There has been no establishment of property belonging to another. This is a chose in action. Cheques.”⁷

[14] He reiterated his view that the main issue in the defence’s submission of no case to answer was the illustration in **Preddy**. He submitted that, “questions of ownership in relation to property are founded on concepts of civil law and these concepts often intersect with the criminal branch of the law”. He contended that it is impossible to steal property unless it “belonged to another” at the time of appropriation and this may present a difficulty, particularly when intangible

⁶ See: Transcript of Trial Proceedings, Volume IV of IV, p. 579, lines 4-15.

⁷ See: Transcript of Trial Proceedings, Volume IV of IV, p. 581, lines 7-9.

property is involved such as a chose in action. Had this been put to the judge properly, Mr. Brice submitted that the judge would have been required to direct the jury to return a verdict of not guilty on the charge of theft of US\$950,000. He also cited **Darroux v The Crown**⁸ and **R v Hilton**⁹ in support of this argument.

[15] Allied to the above, Mr. Brice contended that Mr. Foster's failed to properly address the relevant principles stated in **Preddy**, and as a consequence his assistance was at best casual or, at worst, incompetent. Mr. Brice said that in the end, Mr. Foster's legal representation at his trial was "disastrous in its consequences". He said that this was to his detriment and he was severely prejudiced in a way that adversely affected the fairness of the trial which has rendered his conviction unsafe and unsatisfactory.

[16] He also complained that the learned judge erred in not upholding the no case submission. He said that the judge too did not appreciate the importance of **Preddy** and its relevance. He submitted that had the judge properly applied the principles in **Preddy**, she would have upheld the no case submission.

[17] He therefore urged this Court to allow his appeal and quash the conviction.

Respondent's Submissions

[18] Learned Senior Crown Counsel, Ms. Erica Edwards, submitted that the learned judge was correct in ruling that Mr. Brice had a case to answer and that there was sufficient evidence upon which a reasonable jury properly directed could come to a verdict of guilty. Ms. Edwards opined that the extent of the no case submission was in relation to the elements of 'intention to permanently deprive' and 'property belonging to another'. In seeking to counter Mr. Brice's argument, Ms. Edwards relied on **Maureen Peters v The Queen**¹⁰ at paragraph 25 where the Court of

⁸ [2018] EWCA Crim 1009.

⁹ [1997] 2 Cr App R 445.

¹⁰ Territory of the Virgin Islands High Court Criminal Appeal No. 5 of 2009 (delivered 1st October 2010, unreported).

Appeal stated:

“The basic rule in deciding on a submission of no case at the end of evidence adduced by the prosecution is that the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond reasonable doubt. Per Lord Carswell in *Director of Public Prosecutions v Varlack* at paragraph 21. After describing the rule above as the canonical statement of the law found in the judgment of Lord Lane in *R v Galbraith*, Lord Carswell observed that the underlying principle that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the judge is equally applicable in cases concerned with the drawing of inferences.”

[19] Ms. Edwards then succinctly summarised the evidence the learned judge had the benefit of hearing in relation to “property belonging to another” when the no case submission was dismissed. She submitted that based on this evidence, the learned judge had sufficient evidence before her to establish the offence for which Mr. Brice was charged. Ms. Edwards maintained that the principle most relevant to this case was that Mr. Brice, at the time of the taking, treated the money as his own and intended to permanently deprive Regency of the money. Her arguments focused, in the main, on the requirement that Mr. Brice had an intention to permanently deprive Regency of the money.

[20] It is however clear that the nub of Mr. Brice’s appeal was that the case of **Predgy** was applicable, it was not adequately presented to the judge and she erred in dismissing the no case submission, therefore rendering the conviction unsafe. At the invitation of the Court to address Mr. Brice’s specific argument on appeal, Ms. Edwards said that **Predgy** was distinguishable on its facts, and therefore that the learned judge did not err in overruling Mr. Brice’s no case submission.

[21] Ms. Edwards first sought to impress upon this Court that there were distinguishing features between the UK Theft Act and that in Anguilla which made **Predgy** inapplicable. However, on a close review of the relevant provision of the **Criminal Code** she, quite properly, resiled from that position. She then said that **Predgy** dealt with a cheque that was presented for payment, and that the Court

determined that, “a charge of theft of [a] cheque will not succeed, for there will be no intention to permanently deprive the drawer of the cheque form, which would on presentation for payment be returned to the drawer via his bank”. On this basis, Ms. Edwards maintained that the judge was correct in not applying **Preddy** and therefore the appeal ought not be allowed on the basis of the principles in that case.

- [22] Turning next to Mr. Brice’s complaint on the ineffective assistance of counsel, Ms. Edwards referred this Court to paragraph 7-83 of **Archbold: Criminal Pleading, Evidence and Practice 2019**¹¹ quoting the decision in **R v Day**¹² in relation to the test for the conduct of legal representatives. Ms. Edwards reminded this Court that the single test of which the Court ought to be satisfied is that the incompetence of counsel led to some “identifiable errors or irregularities in the trial, which themselves rendered the process unfair and unsafe”. Ms. Edwards also relied on the following passage from paragraph 7-83 of **Archbold** which states that:

“Matters which are personal to an advocate which might affect performance cannot per se render a conviction unsafe; the issue must always be whether they did affect performance to such an extent as to render the conviction unsafe...”

- [23] Ms. Edwards submitted that Mr. Brice, unlike an ordinary defendant, has a law degree and would be aware of the procedures to be followed when dissatisfied with the conduct of his counsel during the trial. She said that Mr. Brice instead allowed the entire trial to continue and did nothing. She said that what is more interesting is that the arguments in relation to ineffective assistance of counsel have come upon the death of defence counsel so that there is no way to verify the information provided. She therefore urged this Court to reject Mr. Brice’s complaint that his then counsel’s conduct of the case undermined the safety of his conviction.

¹¹His Honour Judge Mark Lucraft, QC, *Archbold: Criminal Pleading, Evidence and Practice* (67th edn., Sweet & Maxwell 2018).

¹² [2003] EWCA Crim 1060.

- [24] Finally, Ms. Edwards stated that there is no basis singularly or collectively upon which this Court should allow Mr. Brice's appeal. She therefore implored this Court to dismiss it.

Discussion and analysis

- [25] The two issues that have been identified are inextricably linked and would be addressed in that manner for convenience.
- [26] In order to ascertain whether there is any merit in Mr. Brice's complaints, it is necessary to first outline the offence for which Mr. Brice was charged and the particulars of the offence. Count 1 of the indictment, which deals with theft, is in the following terms:

"Count 1

Statement of Offence

Theft contrary to section 242 as provided for by section 248(b) of the Criminal Code Revised Statute of Anguilla, Chapter C 140.

Particulars of Offence

Joseph Brice on the 11th day of December 2008, in the Island of Anguilla, stole US\$950,000.00, the property of Regency Holdings Limited."

- [27] It is useful at this stage to set out the relevant statutory provisions of the **Criminal Code**. Section 242(1) stipulates that a person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it, and the words "thief" and "steal" ought to be construed accordingly. Section 243 then goes on to indicate what acts are not considered to be dishonest.
- [28] The term "appropriates" is defined in section 244 as follows:
- "(1) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by dealing with it as its owner."

- [29] Section 245 defines the term “property”. Subsection (1) states:
- “For the purposes of this Part, the term “property” includes money, whether in the form of cash, cheque, credit card, bank draft, money order or otherwise, and all other property, real or personal, including things in action and other intangible property.”
- [30] Section 246 defines the term “property belonging to another” in the following terms:
- “(1) Property shall be regarded as belonging to any person having possession or control of it or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).
- ...”
- [31] It is noteworthy that the facts which underpin this dispute are undisputed. It is common ground that Mr. Brice gave instructions to Fortis Bank to transfer US\$950,000.00 from Regency’s account to an account in Anguilla that was owned and controlled by Mr. Brice.

Applicable legal principles

- [32] The question at the heart of this appeal is whether or not the principles established in **Preddy** are applicable to the appeal at bar. It is evident that a central point is the resolution of the correctness of Mr. Foster’s underdeveloped arguments before the judge and Mr. Brice’s extensive written submissions on appeal, all to the effect that there could have been no theft of the money in the account based on the principles in **Preddy**.
- [33] This brings into sharp focus the principles that were enunciated in **Preddy**. The House of Lords in **Preddy** considered similar arguments and made definitive pronouncements which are instructive. In that case, the appellants were convicted of obtaining property by deception contrary to section 15(1) of the UK Theft Act 1968. The appellants made numerous dishonest and successful applications to building societies to obtain mortgage advances. The advances were made to them by means of electronic transfer from the building society’s account to the

appellants' account. The appellants appealed and contended that the conviction was unsafe on the basis that no property had been obtained. The House of Lords considered the meaning of 'property belonging to another' in this context. Lord Goff of Chieveley, speaking on behalf of the court in allowing the appeal against conviction of the appellants, pronounced as follows:

"The crucial question, as I see it, is whether the defendant obtained (or attempted to obtain) property *belonging to another*. Let it be assumed that the lending institution's bank account is in credit, and that there is therefore no difficulty in identifying a credit balance standing in the account as representing property, i.e. a chose in action, belonging to the lending institution. The question remains however whether the debiting of the lending institution's bank account, and the corresponding crediting of the bank account of the defendant or his solicitor, constitutes obtaining of that property. The difficulty in the way of that conclusion is simply that, when the bank account of the defendant (or his solicitor) is credited, he does not obtain the lending institution's chose in action. On the contrary that chose in action is extinguished or reduced pro tanto, and a chose in action is brought into existence representing a debt in an equivalent sum owed by a different bank to the defendant or his solicitor. In these circumstances, it is difficult to see how the defendant thereby obtained *property belonging to another*, i.e. to the lending institution."¹³

[34] There is no doubt that the principles that were enunciated in **Predby** are very applicable to the appeal at bar even though in the instant case, the transfer from Regency's bank account was by faxed instructions to the bank. The funds in Regency's account constituted a right to obtain the sum on demand from the bank - a form of property. When the funds were transferred into Mr. Brice's bank account, Regency's chose in action for the sum transferred was extinguished and a new right was created in the form of property in the ownership of Mr. Brice. Therefore, in my view, there was no evidence in relation to the charge of the theft of US\$950,000. The evidence adduced by the prosecution clearly could not go towards establishing any action that amounted to Mr. Brice having stolen US\$950,000.

[35] I have no doubt that **Predby** represents the common law and is still good law and

¹³ Supra note [5] at p. 834.

is very persuasive. **Predy** was followed and emphasised in **Hilton**, the latter concerned the theft of a credit balance. In **Hilton**, the appellant was the chairman of a charitable society. He caused the society's bank to transfer sums of money, on two occasions, by sending instructions by fax and on another occasion by writing a cheque. The appellant was charged with theft. The count, which originally read 'stole 25,000 belonging to Abbeyfield (Worsely) Society Ltd' was **amended to read, 'stole a credit balance of 25,000'** in recognition of **Predy** which emphasised the need to identify the chose in action, meaning the debt owed by the bank to the society and represented by the current account, as the property which was alleged to have been stolen. The appellant appealed on the basis that the conviction was unsafe in light of **Predy**. The court in dismissing his appeal stated:

"...Here, the property which was stolen was part of the credit balance in the Society's account with its bank. In law, this represents a debt owed by the bank to the Society, and the property in question is the Society's right as creditor to recover this debt from the bank. The essence of the **Predy** decision is that 'property' has to be defined in this legal sense, in accordance with the general principles of statutory interpretation, which leaves no room for the more general concepts of "money" or "funds" which ordinary parlance might otherwise suggest. Property, therefore, which was capable of being stolen undoubtedly existed in this form in the present case."

Lord Justice Evans in **Hilton** then went on to observe, in relation to Professor Smith's Commentary,¹⁴ that:

"...We do not read his further comments as casting doubt on the basic proposition that where property in the form of a **credit balance** is identified in accordance with the **Predy** decision, then that property is stolen when an act of appropriation in accordance with section 3(1) of the Theft Act is established and the other requirements of theft are also present." (emphasis mine)

[36] It is clear that the law requires that an accused person in similar circumstances to the case at bar should be charged with theft of a credit balance, in contradistinction to theft of the actual money

¹⁴ [1996] Crim LR at 669.

[37] By way of emphasis, Mr. Brice was tried for having stolen US\$950,000.00 as distinct from having stolen a credit balance. Indeed, he was tried for theft contrary to section 242 as provided for by section 248(b) of the **Criminal Code**. This section is reproduced at paragraph 25 above.

[38] The principles that were enunciated in **Preddey** were recently considered in **Darroux v The Crown**. In that case, the issue was whether the acts of Mrs. Darroux constituted “appropriation” within meaning of the Theft Act 1968, the court considered the principles of **Preddey**. The facts are that the defendant, who was a senior employee at a residential care home run by a charity, submitted false records to claim for her entitlement to overtime and other additional payments. She completed forms which, once approved, were sent to PCS Limited, a company engaged by the charity to provide pay roll services. The payments would then be made to her personal bank account from the charity’s bank account. She was charged with various counts alleging theft, namely that she ‘stole monies belonging to’ the charity. She was convicted. She appealed, contending that the case and evidence presented at trial could not in law sustain counts of theft since there were no acts constituting the appropriation of property belonging to another. Allowing the appeal, Davis LJ observed, at paragraph 21, in relation to the counts of theft that:

“This straightaway should have set alarm bells ringing. No one had ever suggested that the appellant had stolen cash in a till or in a safe. The “monies” in question related to the Housing Association’s (in credit) bank account. While in lay terms it is commonplace to talk of money in the bank, it is in legal terms elementary that a bank account constitutes a chose in action, representing the debt due from the bank to the account-holder. So on any view the counts were incorrectly particularised.” (emphasis mine)

[39] I have no doubt that the principles in **Preddey**, as applied in **Hilton** and reinforced in **Darroux** are applicable to this appeal and are determinative of the appeal, as will be seen shortly. I can do no more than apply the above very helpful pronouncements to the appeal at bar. In so doing, it is critical to determine whether the evidence adduced by the Crown was capable of establishing the

actus reus of theft of US\$950,000.00. In my view, the evidence adduced by the Crown was insufficient in law to establish a prima facie case of theft of US\$950,000 for which Mr. Brice had been tried. Like the acts in the case of **Darroux**, the acts of Mr. Brice, on any view could not amount to appropriation of the money. This is due to the principle elucidated in **Preddy** that the sum transferred was not property belonging to Regency since their right to demand payment from Fortis Bank would have been extinguished when the transfer was made and a new property (Mr. Brice's right to demand payment from his bank) now created. It is well settled that the elements of the charge must be supported by the evidence that is led. I have no doubt that there is great force in Mr. Brice's argument that there is a lack of cogent evidence to establish an essential element of the offence of the theft of US\$950,000. Based on the above principles, Mr. Brice's conduct could never have given rise to theft of the money. In this regard, the enunciation of Davis LJ in **Darroux** holds true.

[40] This brings me now to address the matters of the no case submission and competence of counsel.

No case submission and ineffective assistance of counsel

[41] Mr. Brice's complaints bring into sharp focus whether, in relation to the no case submission, Mr. Foster's conduct and representation fell below the standard expected of counsel. This court therefore has to interrogate whether Mr. Foster's competence and conduct displayed during the prosecution's case and ultimately up to the time of the no case submission was such that it undermined the safety of Mr. Brice's conviction. As alluded to, and inextricably linked to the matter is the issue of whether the learned judge erred as a matter of law, in rejecting the no case submission advanced by Mr. Foster on behalf of Mr. Brice.

[42] The applicable principles to no case submissions have long been settled in **R v Galbraith**.¹⁵ The pronouncements of Lane CJ in **Galbraith** firmly established the

¹⁵ [1981] 2 All ER 1060.

courts' approach to no case submissions. These settled principles need no exhaustive recitation but suffice it to state His Lordship's helpful formulation as follows:

"How then should the judge approach a submission of 'no case'? (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 or 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 properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case.* (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred. 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."¹⁶ (emphasis mine)

[43] There is no need for extensive reference to the several cases that have consistently applied the **Galbraith** principles. It is trite that the judge at the close of the prosecution's case does not have to find that the prosecution has established the elements of the offence beyond reasonable doubt. The standard to be applied by the judge is whether there is material on which a reasonable jury could be satisfied of the defendant's guilt.¹⁷ In essence, the question is whether the prosecution has led evidence to establish a prima facie case that requires the defendant to answer.

[44] In seeking to address the no case submission issue, it is convenient to recite Mr. Brice's complaint against Mr. Foster. The crux of Mr. Brice's argument on this issue is that Mr. Foster's incompetence undermined the safety of his conviction. It is said that there is something objectionable in the way in which Mr. Foster

¹⁶ Ibid at p.1062.

¹⁷ See *Taibo v R* (1996) 48 WIR 74; *Maureen Peters v The Queen*, Territory of the Virgin Islands High Court Criminal Appeal No. 5 of 2009 (delivered 1st October 2010, unreported) at para. 28.

conducted himself generally. All of this must be viewed against the background that Mr. Foster was a very experienced criminal lawyer who practised widely in the Eastern Caribbean.

[45] As stated earlier, Mr. Foster having died, there was no evidence from him to address the many complaints that Mr. Brice made. During his oral presentation, Mr. Brice sought to impress upon this Court that Mr. Foster was inebriated most times. However, he did not lead any positive evidence of this occurring during the retrial and what if any impact it had on Mr. Foster's representation. It must be stated nevertheless that a close reading of the transcript of the proceedings did not paint a good picture of how Mr. Foster treated with the no case submission. One would have thought that such an important matter of the no case submission which was based on a technical legal principle would have attracted some more attention and treatment from Mr. Foster. For the most part, Mr. Foster was a bit flippant in his treatment of the no case submission. At the very least, he was required to distill the applicable principles from **Preddy** and advert the judge's attention to them.

[46] Mr. Foster did not expand nor analyse **Preddy** for the benefit of the judge. Mr. Brice however, armed with written notes which he read to the Court, sought to explain the case. I should say however that the arguments that Mr. Brice read from the written script were more analytical and comprehensive. In fact, due to the fact that he represented himself after the Court had taken a break, we permitted his request to further explain **Preddy**. He was more expansive in his reading of his notes on **Preddy** when provided with the opportunity to read in detail from them.

[47] For the present purposes it must be emphasised that Mr. Foster, though relying on **Preddy**, did not take the time to explain the principle that emanated from the case with the care that was required to impress upon the judge that the prosecution had led no evidence on an essential element of the offence of theft. This much is

evident from the transcript. I agree with Mr. Brice that Mr. Foster conflated the principle with the mental element of the offence of theft.¹⁸ Given what I have stated above on the applicability of **Preddy**, it is apparent that the case has nothing to do with the mental element of the offence. Accordingly, there is much force in Mr. Brice's criticism that Mr. Foster did not render the sort of assistance required in analysing and distilling the guiding principles in **Preddy**.

[48] Fundamentally, Mr. Foster did not bring home or impress upon the judge that he was asserting that it was impossible for Mr. Brice to have stolen the money given the factual matrix. This is made clear from exchanges between himself and the judge. Nothing would be gained from repeating them but it is clear that the judge tried to get Mr. Foster to address the relevance of **Preddy**.¹⁹

[49] It must be emphasised that at the very least, Mr. Foster was required to analyse **Preddy** and seek to persuade the court of its relevance. In fairness to the judge, the transcript reveals that she indicated that she was not happy with Mr. Foster's treatment of the case and by extension, the no case submission.²⁰

[50] Indeed, there is evidence on the record which indicates that the judge tried to have Mr. Foster present the no case submission in a coherent way and asked him for the authorities or principles which were relevant. The record reveals that the learned judge was not alive to the issue that was being taken based on **Preddy** and stated as follows:

“THE COURT: No, I will do not what I please, I will make a judicial determination after consideration of your submission and the response of counsel. It's not do as you please.

MR. FOSTER: No, I'm sorry.

THE COURT: This is not how I function.

MR. FOSTER: I'm sorry.

THE COURT: This is why I'm taking time to try to understand clearly what the submission is. Now talking in broad terms, you know, doesn't assist. You haven't even condensed or basically, putting the case in front of me,

¹⁸ See: Transcript of Trial Proceedings, Volume IV of IV, p. 567, lines 3-15 and lines 20-21.

¹⁹ See: Transcript of Trial Proceedings, Volume IV of IV, p. 579, lines 16-20 and p. 581, lines 3-6.

²⁰ See: Transcript of Trial Proceedings, Volume IV of IV, p. 574, lines 1-6.

given me a brief summary of why this decision, you know, relates to this case. This —...”²¹

[51] In relation to Mr. Foster’s representation of Mr. Brice, it is important to recognise, for the present purposes the applicable principles stated in **Boodram (Ann-Marie) v The State**.²² The Board in **Boodram** acknowledged that Chief Justice de la Bastide in **Bethel v The State (No.2)**²³ as he then was, correctly stated the applicable principles. Chief Justice de la Bastide stated as follows:

“...we consider that when the conduct of a case by counsel forms the ground of appeal, we too ought to focus on the impact which the faulty conduct of the case has had on the trial and the verdict rather than attempt to rate counsel’s conduct of the case according to some scale of ineptitude”

On the other hand, the then learned Chief Justice correctly observed that there may be cases where counsel’s misconduct has become so extreme as to result in a denial of due process to his client. In such cases, the impact of counsel’s conduct on the result of the case is no longer of relevance and the conviction must be quashed.

[52] In relation to Mr. Brice’s complaint about incompetence of counsel, it is judicially accepted, that I must and I have kept in mind two relevant considerations. First, an appellate tribunal must approach complaints about counsel’s incompetence, and its effect with a healthy skepticism. On the other hand, where it has been demonstrated that counsel’s failures were of a fundamental nature, the court must proceed with great care before it concludes that, on the hypothesis that had the failures not occurred, the verdict of the jury would inevitably have been the same.

[53] Nevertheless, in the present appeal, in my view, judicial restraint must be exercised where the majority of complaints that were made against counsel emanate from the instructions allegedly given by Mr. Brice to Mr. Foster, who is now deceased and cannot respond. This however does not negate the fact that

²¹ See: Transcript of Trial Proceedings, Volume IV of IV, p. 580, lines 2-16.

²² (2001) 59 WIR 493.

²³ (2000) 59 WIR 451 at p. 459.

an attorney who is representing a client in a trial is required to display the requisite level of competence. As indicated earlier, the transcript confirms that Mr. Foster was a very experienced criminal lawyer who practised across the Eastern Caribbean. I therefore recognise that there is no need to dwell on the alleged misconduct of Mr. Foster except in so far as they can be gleaned from the transcript to have impacted one way or the other the no case submission, and importantly, on the safety of Mr. Brice's conviction.

[54] Having perused the transcript, it is patently clear as alluded to, that there was the need for the principles that were at the foundation of the no case submission as enunciated in **Preddy** to be forensically stated and applied to the evidence that was led by the Crown. This was not done by Mr. Foster. Neither did the learned judge carry out the appropriate analysis of **Preddy** but instead took comfort in section 247 of the **Criminal Code**. I do not need to repeat or recite the manner in which the principles in **Preddy** were stated in the transcript, but it suffices to state that the judge said that **Preddy** was not relevant, but rather that the provisions of the **Criminal Code** which address theft were relevant to the no case submission.

[55] Whilst not making a finding of incompetence against Mr. Foster, based on a close reading of the transcript, it must be stated that there is no impediment to this Court concluding that the representation that Mr. Foster gave could have been enhanced and more helpful, both to the court and to his client. He could have been more professional and less casual in submitting that Mr. Brice had no case to answer. The complaints against Mr. Foster are serious based on the fact that the applicable legal principles were supportive of the no case submission.

[56] In a no case submission, the critical question that the judge has to decide is whether a jury, properly directed, can convict on the evidence that the Crown has led. The essential question in the present case remains whether the safety of Mr. Brice's conviction has been undermined given the totality of the circumstances.

[57] It is evident that Mr. Brice's complaint that the Crown had led no evidence to establish an essential element of the offence of theft of US\$950,000 has fallen on very fertile ground. Based on the guidance of **Preddy** as applied in **Hilton** and reinforced in **Darroux**, I have no doubt that based on the evidence that was led by the Crown, it would have been impossible for the jury, properly directed, to convict Mr. Brice of theft of US\$950,000. **Preddy** makes it clear that it is impossible in similar factual circumstances to steal money in a bank account. I do not propose to dwell on the judge's treatment of the no case submission. I have no doubt however, that given the lack of adequate assistance by counsel, the learned judge may have been better served by rising from the bench for a few minutes and apprising herself of the applicable principles in **Preddy**. There does not seem to be any good reason why the judge did not do so from a close reading of the transcript.

[58] Based on what I have foreshadowed, there is justification for Mr. Brice's complaints: the cumulative effect of Mr. Foster's lack of effective assistance to the court on the principles in **Preddy** coupled with the court's failure to grapple with the applicable principles resulted in the no case submission being overruled. It may be said that the manner in which Mr. Foster conducted himself during the trial may have led the judge to reject his casual submission of no case to answer based on **Preddy**. This in no way negates the duty of the judge to ensure that the no case submission based on **Preddy** was properly addressed.

[59] For emphasis, it should be highlighted that the evidence that the Crown led could not establish a prima facie case that Mr. Brice had stolen US\$950,000.00. If at all, the charge, based on **Preddy** as applied in **Hilton**, ought to have been in relation to the credit balance. The failure to do so was fatal. The judge ought to have upheld the no case submission since the Crown failed to lead any evidence on an essential element of the offence with which he had been charged namely, theft of US\$950,000.00. I reiterate that there was absolutely no evidence led by the Crown in relation to the actus reus of the offence for which Mr. Brice had been tried.

[60] On this appeal, the arguments in rebuttal that were advanced by the Crown indicate that the matter was viewed from a wrong perspective and did not negate nor disarm Mr. Brice's submissions on **Preddey**.

[61] Based on the totality of the evidence, and applying the instructive principles in **Preddey, Hilton** and **Darroux**, I arrive at the ineluctable conclusion that the learned judge erred in law by rejecting the no case submission, since the evidence adduced by the Crown was incapable of establishing the actus reus of theft of US\$950,000.00. Had the learned judge given deliberate consideration to **Preddey**, she would have upheld Mr. Foster's no case submission.

[62] By way of reminder, **Hilton** as reinforced by **Darroux** instructs that the application of **Preddey**, in circumstances that are analogous to the acts of the appeal at bar, requires that a charge of stealing the credit balance be proffered as distinct from one of stealing the actual sum in order for it to be sustainable.

Conclusion

[63] For the above reasons, I would allow Mr. Brice's appeal and set aside his conviction.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Gerard St. C Farara, QC
Justice of Appeal [Ag]

By the Court

Chief Registrar