

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Mag. App. No. P 021 of 2017

BETWEEN

RAJESH RAMSAWAK

APPELLANT

AND

KAWALDATH LUTCHMAN P.C. #13752

RESPONDENT

PANEL:

R. Narine, J.A.

M. Mohammed J.A.

APPEARANCES:

Mr. R. Persad and Ms. L. Lakhan for the Appellant

Ms. M. Joseph and Mrs. A. Teelucksingh-Ramoutar, Assistant D.P.P., for the Respondent

DATE OF DELIVERY: 29th June, 2017

JUDGMENT

Delivered by: M. Mohammed, J.A.

Introduction:

- (1) The appellant was charged under **section 34(1) of the Larceny Act Chapter 11:12** with the offence of obtaining, with the intention to defraud Lynesha Hannaway, the sum of \$96,000.00, which represented part payment towards the purchase of three lots of land, by falsely pretending that he was the owner of the land.
- (2) After hearing the evidence in the matter, as well as the submissions of counsel on both sides, the magistrate found the appellant guilty of the offence. The appellant was sentenced to forty months imprisonment with hard labour.

The appellant has appealed his conviction and sentence.

The Case for the Respondent:

- (3) On the 12th December, 2010, the virtual complainant, Lynesha Hannaway (Hannaway), responded to an advertisement for the sale of land in a local newspaper. She contacted the number listed on the advertisement and had a conversation with a woman named Indira. She made arrangements to meet Indira and subsequently met her some time later in Cunupia. Indira took Hannaway to the location of the parcels of land which were for sale and produced the cadastral sheet detailing the land and the lots that were available. Hannaway expressed to Indira her interest in purchasing three of the available lots of land and she was given the contact information for the appellant, Rajesh Ramsawak. Hannaway contacted him and arranged to have a meeting with him. A few days later, Hannaway met with the appellant at his Grandside residence in Tunapuna and he showed to her the same cadastral sheet that was shown to her by Indira. The appellant told Hannaway that he was the owner of the parcels of land, which he was selling at the price of \$120,000.00 per lot. He

explained that for the three lots of land, he required a down payment of \$30,000.00 and a monthly instalment of \$3,000.00. On the 22nd December, 2010 Hannaway, along with her friend, Private Junior Charles (Charles), went to the appellant's residence where she made the down payment of \$30,000.00 and received the sale agreement. The appellant gave Hannaway his banking information in order for her to pay the monthly instalments. Hannaway, Charles and the appellant all signed the agreement and Hannaway was given a receipt for the down payment. The appellant gave an undertaking that an access road would be constructed in order to gain entry to the parcels of land.

- (4) Following the transaction, Hannaway left the jurisdiction on the 5th January, 2011 for a year in order to pursue military training. She entrusted Charles with the responsibility to pay the monthly instalments to the appellant. Charles paid the instalments and provided Hannaway with the relevant receipts detailing the payments. On her return to the jurisdiction, Hannaway had conversations with the appellant and realised that the access road to the land had not been constructed. The appellant told her that he had difficulties in getting persons to construct the road. Hannaway continued paying the appellant the monthly instalments.
- (5) In 2012, Hannaway left the jurisdiction to do additional military training and returned in September 2012. On returning to the jurisdiction, she found out that the access roads to the land had still not been constructed. In November, 2012, Hannaway informed the appellant that she no longer wished to purchase the three lots of land and she requested a refund of the money paid. The appellant agreed to refund her but failed to do so and subsequently became evasive towards her.
- (6) On the 17th January, 2013, Hannaway reported the matter to the Fraud Squad Division. The respondent, PC Lutchman, conducted inquiries into the matter and on the 7th August, 2013, after receiving certain information, he, along with Ag. Inspector Singh went to a house located at Orange Grove Road in Tacarigua where they met the appellant. PC Lutchman informed the appellant of the report he was investigating and hereplied, *"Yes, Officer, I know of that report. I collected the money from her, but she changed her mind and the deal was cancelled. I have the documents. I give the money to the Ramhits."* The appellant was taken to the office of the Fraud Squad Division in Port of Spain where he was shown several documents, including, (i) a copy of a Protocol Deed

No. 197705370837, (ii) a cadastral sheet in relation to the land represented in the Deed, (iii) a document which stated the account information of the Appellant, (iv) a receipt No. 18 dated the 22nd December, 2010 in the sum of \$30,000.00, with a stamp “Raj Real Estate Investment Ltd” (sic) and a signature purporting to be that of the appellant’s, (v) three agreements dated the 22nd December, 2010 relative to Lots Nos. 11, 12 and 13 at Dan’s Road, Las Lomas in Cunupia and (vi) eighteen Royal Bank transaction receipts which varied in dates and sums for payment to the appellant. PC Lutchman cautioned the appellant and informed him of his right to consult with an attorney and he replied, *“I already spoke to my attorney Christopher Gilder and he told me to cooperate with the police and tell them anything that could help.”* An interview was conducted with the appellant and he revealed that some of the money which he collected from Hannaway was given to the Ramhits. He said that he paid the Ramhits with four cheques totalling \$150,000.00. He sought an opportunity to repay Hannaway and asked for a month to do so.

- (7) On the 23rd June, 2014, the appellant returned to the office of the Fraud Squad Division and gave a cautionary statement to PC Lutchman. In that statement, the appellant said that he had a verbal agreement with the Ramhits to sell their land and they told him to contact their attorney-at-law and have the agreement written up. The appellant contacted the attorney-at-law about the agreement but it was never done. He subsequently received permission from the Ramhits to proceed with selling the land. The appellant admitted that he did not make a 10% deposit for the land but paid them \$150,000.00. He also agreed that Hannaway paid him \$96,000.00 for the three lots of land but indicated that she stopped paying for the land when he told her that she would get the deed when she completed the full payment. The appellant gave an undertaking to repay Hannaway but failed to do so. He was subsequently charged for the offence.
- (8) Evidence was given by Vashti Ramhit who testified that in December, 2010, the appellant approached her parents, and by an oral agreement, he agreed to purchase land from them at the price of \$2,300,000.00. Ramhit had a power of attorney to deal with her mother’s property after her father died. The appellant made four payments totalling \$170,000.00 and was given a copy of the deed. The appellant then told the Ramhits that he was having difficulties in paying the balance of the money but said that he would do so eventually. It was subsequently brought to Ramhits’

attention that persons were building structures on the land. When those persons were contacted, they said that they purchased the land from the appellant.

The Case for the Appellant:

- (9) The appellant elected to give evidence and called no witnesses. He testified that at the time of the transaction in question, he had been a real estate broker for eleven years. He knew Hannaway through an agreement for the sale of land for certain parcels of land in Las Lomas. The land in question belonged to Mrs. Dullin Ramhit and Moonilal Ramhit. The appellant, by virtue of an oral agreement made between him and the Ramhits in October 2010, had permission to sell the land. According to the appellant, he was selling parcels of land in Las Lomas and had an advertisement in a newspaper to that effect. The Ramhits contacted him and invited him over to their house. The appellant went to the house and met the Ramhits and their two daughters, one of whom was Vashti. The Ramhits told him that they wanted to sell their land in Las Lomas at a price of \$2,300,000.00. The appellant told them that it was impossible to get that price for the land. He however told them of a strategy which was that he would sell the land for a small down payment and a small monthly instalment so that persons would be able to afford it. He told them that after a certain number of years, the payments would add up to the \$2,300,000.00. The appellant gave evidence that for every \$60,000.00 that he received as payment towards the land, he would retain approximately \$10,000.00.
- (10) The appellant testified that Hannaway responded to his advertisement in the newspaper for the sale of land in Las Lomas. Hannaway went to the appellant's office and expressed her interest in the land. The appellant gave her a cadastral sheet and made an agreement for the sale for three lots of land. He told her that he was a real estate agent and that he was selling the land on behalf of the Ramhits. He also informed her that he would get an attorney-at-law to complete the searches and he gave her a copy of the deed.
- (11) Hannaway made payments for the land and later told him that she no longer wished to purchase the land. In March 2015, he spoke to Hannaway's attorney-at-law and sought to make

arrangements for a refund of the money. He told the attorney-at-law that he did not have the money at the time as it was given to the owners of the property. He however indicated that he would refund the money from his “own pocket” until he received the money from the owners. He undertook to pay Hannaway \$10,000.00 to \$15,000.00 per month over a period of six months. However, Hannaway and her attorney-at-law were not pleased with his proposed method of payment. The appellant also approached Hannaway and made attempts to repay her and she did not accept the money as she requested a larger sum than she initially paid.

The Magistrate’s Reasons:

(12) The core reasoning of the magistrate, as reflected in his written reasons¹, was as follows:

- (i) The evidence and the facts of the case showed that the appellant was incapable of passing the title to land onto Hannaway;
- (ii) The Court rejected the appellant’s assertion that he had been a real estate agent for eleven years and that he was acting on the instructions of the Ramhits, who were the true owners of the property in Las Lomas. The Court took into account that the appellant was not in possession of any written or oral contract either to buy the land from the Ramhits or to sell it on their behalf;
- (iii) The Court accepted the prosecution’s evidence, as given by Vashti Ramhit, the daughter of the owners of the property, that the appellant had entered into an oral agreement to purchase the property at an agreed sum and upon agreed terms but never completed the agreement;
- (iv) On the evidence in the case, there was a clear indication that the appellant intended to defraud Hannaway. The Court accepted the prosecution’s evidence that the appellant made himself out to be the owner of the land. In arriving at this conclusion, the Court

¹ See the Magistrate’s Reasons at pages 238-245 of the Record of Appeal.

took into account the documentary evidence tendered, including the purchase agreement between the parties, which named the appellant as the vendor and the deposit slips which showed that the money was paid into the appellant's personal savings account;

(v) The "fluid nature" of the appellant's agreement with the Ramhits was unlikely, given that the appellant said that the agreed purchase price for the land was \$2,300,000 when he felt the land was worth around \$400,000.00; and

(vi) The Court also found as nebulous the agreed terms of engagement and cut off time for the payments. In the Appellant's view, he was entitled to deduct a sum for his efforts and the Ramhits agreed to this. However, in his evidence, the appellant gave examples of deductions rather than an agreed percentage of the payments. Further, according to the appellant's evidence, there was no agreed date for his payments to the Ramhits to cease. The fluid and flexible nature of the unwritten contract that the appellant laboured under made such an agreement unlikely.

The Appeal:

Ground 1: The decision of the Learned Magistrate is unreasonable and cannot be supported having regard to the evidence.

The Appellant's Submissions:

(13) Mr. Persad, counsel for the appellant, submitted that the magistrate, in his reasons, failed to show an appreciation of the critical issues and the core evidence in the case, namely, whether the appellant made a false pretence to Hannaway that he was the owner of the three lots of land in Las Lomas and whether there was evidence of an arrangement between the Ramhits and the appellant

whereby he was authorised to sell the lots of land at the time that he entered into the agreement for sale with Hannaway. It was further submitted that the magistrate failed to show a proper understanding of, (i) the importance of the appellant providing the deed to Hannaway, (ii) the fact that the appellant signalled that he was a real estate agent at the material time and (iii) the fact that the prosecution failed to provide evidence from the Ramhits as to the agreement entered into in October, 2010.

The Respondent's Submissions:

- (14) Counsel for the respondent, Ms. Joseph, submitted that the magistrate, in his written reasons, addressed his mind to the issues highlighted by the appellant, when he assessed and analysed the competing versions of the evidence for both the prosecution and defence. It was submitted that the magistrate, in analysing the critical issues of the case, was entitled to explore the implausibility of the appellant's assertion that he was merely an agent authorised by the Ramhits to sell the parcels land on their behalf. According to Ms. Joseph, the magistrate was also entitled to accept the cogent and compelling evidence of Vashti Ramhit where she said that the appellant had gone to their home in Cunupia and made a verbal arrangement to purchase the parcels of land in Las Lomas, belonging to her parents, as a price of \$2,300,000.00.
- (15) Ms. Joseph contended that in the magistrate's determination of the issue whether the appellant represented himself to Hannaway to be the owner of the land in Las Lomas and whether there was an agreement with the Ramhits authorizing him to sell the land on their behalf, he took into consideration several pieces of documentary evidence, namely: (i) the Sale Agreement for the three lots of land in which the appellant was named as vendor, (ii) the documents showing that Hannaway made deposits into the personal savings account of the appellant and (iii) the document showing the down payment made by Hannaway for the three lots of land which was made to the appellant and not the Ramhits.
- (16) It was also submitted that the magistrate's decision was reasonable having regard to the evidence as the elements of obtaining money by false pretences had been made out.

Analysis and Reasoning:

(17) We agree with Ms. Joseph's submission that the magistrate's decision was reasonable based on the evidence. The magistrate in his written reasons properly addressed his mind to the following pieces of evidence:

- (i) The appellant entered into an oral agreement with the Ramhits to purchase the land at an agreed sum and upon agreed terms but never completed it;
- (ii) That the witness Vashti Ramhit saw houses being erected on the land which was contrary to the agreement;
- (iii) The appellant was not in possession of any oral contract either to purchase the land from the Ramhits or sell it on their behalf; and
- (iv) The documentary evidence tendered which included the purchase agreement made between the appellant and Hannaway and the deposit slips showing that Hannaway made deposits into the appellant's personal savings account.

(18) The magistrate therefore demonstrated an appreciation of the core evidence in the case and arrived at a decision that was reasonably open to him. Further, the magistrate's reasons clearly reflect why he preferred the evidence of the prosecution's witnesses and why he found the appellant's defence to be implausible². This is precisely what is required of magistrates, that they carry out a proper analysis of the evidence and show why they prefer the version of one side as opposed to the other.

For these reasons, this ground of appeal is without merit.

² See the Magistrate's Reasons at page 243 of the Record of Appeal.

Ground 2: A specific illegality took place that substantially affected the merits of the case in that counsel appearing for the appellant failed to lead any evidence of his client’s good character and by failing to do so, he affected the fairness of the proceedings.

The Appellant’s Submissions:

(19) Mr. Persad submitted that the evidence of the appellant’s good character was not placed before the court by his attorney during the trial which affected the fairness of the proceedings. In support of this submission, Mr. Persad relied on the decision in **Jeffrey Nelson v Cpl. Singh**³ where John J.A. reviewed several authorities in relation to the duty of counsel to raise the good character of a defendant and the effect of the failure to do so on the fairness of the trial. At paragraphs 33-34, John J.A. said:

“33. In the Teeluck case (at pp.387-388) the Privy Council encapsulated the principles material to the question of a good character direction before their Lordships in that appeal in the following propositions, which are relevant here:

(i) When a defendant is of good character, i.e. he has no convictions of any relevance or significance, he is entitled to the benefit of a good character direction from the judge when summing up to the jury, tailored to fit the circumstances of the case: Thompson v The Queen [1998] A.C. 811, following R –v- Aziz [1995] 2 Cr. App. R 478; [1996] A.C. 41 and R v Vye (1993) 97 Cr. App. R. 134 [1993] 1 W.L.R. 471.

(ii) The direction should be given as a matter of course, not of discretion. It will have some value and will therefore be capable of having some effect in every case in which it is appropriate for such a direction to be given: R v Fulcher [1995] 2 Cr. App. R. 251, 260. If it is omitted in such a case it will rarely be possible for an appellate court to say that the giving of a

³ Mag. App. No. 55 of 2005.

*good character direction could not have affected the outcome of the trial:
R v Kumar The Times, May 14, 1999.*

(iii) *The standard direction should contain two limbs, the credibility direction, that a person of good character is more likely to be truthful than one of bad character and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged.*

(iv) *Where credibility is in issue, a good character direction is always relevant
Berry v R [1992] 2 A.C. 364, 381; Barrow v The State [2002] A.C. 846, 850
Sealey and Headley v The State [2002] UKPC 52, Para. 34.*

(v) *The defendants good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses: Barrow v The State [1998] A.C. 846, 852, following Thompson v The Queen [1998] A.C. 811, 844. It is a necessary part of counsel's duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself: Thompson v the Queen, ibid.*

34. *Of course the Privy Council was there dealing with the question of good character in the context of a direction to a jury. **Where the appeal is from a Magistrate the position is no different. Where the defendant is of good character, the Magistrate must give consideration to it and show, in his reasons, an awareness and appreciation of the issue, the relevant law and evidence, and that he considered it** (see *Sylvan v Ragoonath & Ors* (1966) 11 WIR 33, 36). In Magisterial Appeal No. 3081 of 2003 *Rodriguez v Nimbett*, the Court of Appeal quashed a conviction on the basis, inter alia, that the Magistrate failed to show that he considered the question of the accused's good character." (emphasis added)*

(20) It was argued that the appellant's credibility was a major issue in the case in determining whether he represented to Hannaway that he was the owner of the land and whether he had an agreement with the Ramhits to sell the land on their behalf. Mr. Persad contended that in order for the magistrate to resolve these factual issues, the good character of the appellant was a critical and important factor to consider. The failure to do so resulted in a miscarriage of justice.

The Respondent's Submissions:

(21) Ms. Joseph submitted that in light of the oral testimony of the prosecution witnesses, together with the documentary evidence in the case, a tribunal of fact, having properly directed itself on the appellant's good character, would have inevitably convicted the appellant. Ms. Joseph was of the view that the omission of counsel for the appellant in the court below to lead evidence of the appellant's good character was not fatal to the fairness of the proceedings or to the safety of the appellant's conviction. Reliance was placed on the case of **Alessa Ali v Wayne McFarlane**⁴ in support of this submission.

Analysis and Reasoning:

(22) We agree with the respondent's submission that the failure to take into consideration a defendant's good character is not fatal in every case and it is dependent on the strength of the evidence in each case. In **Alessa Ali v Wayne McFarlane**⁵, the appellant was charged with the offence of uttering a forged document, contrary to **section 9(1) of the Forgery Act Chapter 11:13**. In that case, the appellant applied to the North West Regional Health Authority for the position of Medical Laboratory Technician I. In support of her application, she presented a document purporting to be an original and copies of an Associate Science Degree in Medical Laboratory Technology which was issued by the National Institute of Higher Education Research Science and Technology (NIHERST) and signed by Dr. Merle Hoyte. The appellant was interviewed and was eventually appointed to the position. On the 26th February, 2003, Dr. Hoyte made a report to the Fraud Squad

⁴ Mag. App. No. P022.

⁵ Ibid.

alleging that the document submitted by the appellant in support of her application was false. One of the grounds of appeal advanced in that case was that the omission to raise the issue of good character of the appellant resulted in a miscarriage of justice. On this issue, Narine J.A. opined at paragraphs 34-37:

“34. It is well settled that a defendant is entitled to have his good character considered by the tribunal of fact in assessing both his credibility and propensity to commit the offence: R v. Aziz [1995] 3 All ER 149. A failure to give a good character direction may be held to render the conviction unsafe: Teeluck and John v. State [2005] UKPC 14; Jagdeo Singh v. State [2005] UKPC 35.

35. In Vijai Bhola v. The State [2006] UKPC 9, the Board noted that the cases of Teeluck (supra) and Jagdeo Singh (supra), were cases in which the issue of the credibility of the appellant was said to be crucial. However, the Board noted at paragraph 17 of its opinion that the statement in Teeluck that the direction – “will have some value and will therefore be capable of having some effect in every case in which it is appropriate [to give it and that if] it is omitted in such a case it will rarely be possible for an appellate court to say that the giving of a good character direction could not have affected the outcome of the trial” needs to be applied with some caution.

36. In Vijai (supra), the Board went on to hold that the failure to give the good character direction was not necessarily fatal to the fairness of the trial or the safety of the conviction. Each case must depend on its own facts, and the test to be applied was whether a jury properly directed would inevitably have convicted the accused.

37. In this case the prosecutions’ evidence that the document was a forgery was quite compelling. There was no dispute that the appellant did in fact utter the document. The explanation offered by the appellant as to how she came into possession of the document was far from credible. There was cogent direct evidence from which the Magistrate could have properly inferred that the appellant knew the document was

forged and that she had the requisite intention to defraud or deceive the NWRHA. In my view, in this case the tribunal of fact, having properly directed herself on the appellant's good character would have inevitably convicted her." (emphasis added)

23. Applying the reasoning in **Alessa Ali v Wayne McFarlane**⁶ to the instant case, we find that a magistrate, having properly directed himself on the appellant's good character, would inexorably have convicted the appellant. This is because the evidence in this case, given by both Hannaway and Vashti Ramhit, could properly be described as compelling and overwhelming. There was cogent evidence from which the magistrate could have properly inferred that (i) the appellant represented to Hannaway that he was the owner of the land, (ii) that he did not have an agreement with the Ramhits to sell the land on their behalf and (iii) that he intended to defraud Hannaway.
24. The fact that the appellant's good character was not taken into account at the relevant stage was not fatal to the fairness of the proceedings or to the appellant's conviction.

Accordingly, this ground of appeal is without merit.

Ground 3: A specific illegality occurred that substantially affected the merits of the case.

The Appellant's Submissions:

25. Mr. Persad submitted that the particulars of the charge were that during the period 22nd December, 2010 to the 4th October, 2012, the appellant obtained monies by falsely pretending that he was the owner of the land in question and that he was authorised to sell the land, thereby receiving the sum of \$96,000.00. He submitted that on the prosecution's case, the only evidence of any representation

⁶ Ibid.

being made by the appellant that he was the owner of the land was at a date prior to December, 2010, that date being the date that the agreement for sale was signed. It was contended that in the absence of evidence supporting that such representation was made by the appellant in the period covered by the charge, the charge must fail.

The Respondent's Submissions:

26. In response, Ms. Joseph submitted that the charge was a valid one. She submitted that there was nothing in the charge that required the false pretence to have occurred during the dates mentioned. The charge requires that the appellant "obtained" during those dates. On the evidence, the appellant obtained \$96,000.00 from Hannaway within the specified period by falsely pretending to be the registered owner of the lots of land in Las Lomas. Further, prior to the 22nd December, 2010, the appellant represented himself to be the registered owner of the three lots of land in Las Lomas. The false pretence was therefore a continuing one, which continued on the 22nd December, 2010 and for the time period outlined in the charge. It was upon the basis of this false representation that money was paid by Hannaway during that time period specified in the charge. Ms. Joseph relied on the decision in **R v Greathead**⁷ in support of this submission. In that case, the defendant was hired by John Charles Collins as a foreman. The defendant, by means of a false wage-sheet, obtained from Collins a cheque for the amount stated. The cheque was informally drawn, and he was refused payment by the bank. The defendant returned it to Collins, who gave him another cheque which he then cashed. The defendant then appropriated the difference between what was really due for wages and what was falsely stated to be due. On an indictment charging the defendant with obtaining the appropriated sum of money, it was held that the charge was proved since the false pretence was a continuing one, and that the second valuable cheque was obtained thereby equally with the first.
27. It was further submitted that there was no requirement that the false pretence should be by words as the conduct and the acts of the party are sufficient without any verbal or written representation.

⁷ (1878) 14 Cox 108.

Analysis and Reasoning:

28. We agree with Ms. Joseph's submission that the false pretence in this case was a continuing one, which spanned over the period 22nd December, 2010 to the 4th October, 2012. Although the appellant represented himself to be the owner of the lots of land in Las Lomas prior to the 22nd December, 2010, his actions, including accepting payment for the land after that period, up to the 4th October, 2012, had the effect of expanding the period of the false pretence. During that period, the appellant had an intention to defraud Hannaway. Therefore, the particulars of the charge were accurate and the charge was a valid one.

This ground of appeal is without merit.

Ground 4: The sentence was unduly severe.

The Appellant's Submissions:

29. Counsel for the appellant submitted that the magistrate, in sentencing the appellant, failed to sufficiently specify and/or identify in a transparent manner whether he took into consideration all of the relevant factors and specific principles of sentencing. He argued that the approach taken by the magistrate was inconsistent with the approach adopted by the Court of Appeal in **Nadia Pooran v The State**⁸ and **Aguillera and Ors v The State**⁹ in that the magistrate failed to have regard to an appropriate starting point and range in the circumstances of the case. Mr. Persad further submitted that the magistrate failed to give any consideration to the mitigating factors of both the offence and the offender.

⁸ Cr. App. No. 32 of 2015.

⁹ Cr. App. Nos. 5-8 of 2015.

The Respondent's Submissions:

30. It was submitted that the magistrate's decision predated the decisions in **Nadia Pooran v The State**¹⁰ and **Aguillera and Ors v The State**¹¹ but in any event, the magistrate, in his reasons, took into account the relevant factors in arriving at the sentence. Ms. Joseph submitted that if the sentencing principles in **Aguillera** are applied to the case at bar, it would lead to the same sentence arrived at by the magistrate, that is, forty months imprisonment.

Analysis and Reasoning:

31. The magistrate in his written reasons at **pages 244-245 of the Record of Appeal**, took into account the relevant factors in arriving at the appropriate sentence for the appellant and faithfully applied them. The aggravating factors included:
- (i) That the appellant at all times held himself out to be a professional real estate agent with 11 years' experience;
 - (ii) The appellant was in a far more knowledgeable position than that of Hannaway and she placed her trust in the appellant to be able to deliver the property promised in their agreement; and
 - (iii) That trust continued until November 2012 when Hannaway requested a refund. From that time to the time of sentencing, in spite of the appellant's commitment to make the refund, no such monies were remitted to her.

¹⁰ **Nadia Pooran** (n 8).

¹¹ **Aguillera** (n 9).

32. The magistrate took guidance from the decision in **R v Yates**¹² where the Court of Appeal of England and Wales set out the matters to be taken into account when considering sentencing in fraud cases. In that case, Davis J. said at paragraph 12:

“Clearly the relevant factors will vary from case to case. However, we would suggest that -- and subject always to the Definitive Guidelines -- in the case of a loan or loans obtained by fraud of this kind some of the potentially relevant features may be (in no particular order) as follows: first, whether one or several transactions are involved; second, whether the fraud is committed by a professional person or is otherwise committed in breach of trust; third, the nature of the fraud will need to be considered and the means by which it is carried through; fourth, whether the fraud was an isolated incident or involved ongoing deception; fifth, the amount of money sought and obtained; sixth, the amount of actual loss, so far as it can be identified, to the lender; seventh, whether the offender has involved others, or is involved with others, in the fraud; and eighth, whether at the time there was an intention to repay (and, if so, the anticipated means of repayment) or whether there was no intention to repay. There may well be other factors, and regard will of course need to be had in the usual way to matters such as a guilty plea, relevant previous convictions or lack of previous convictions, and so on. In particular, regard must, of course, always be had to the relevant Definitive Guidelines.” (emphasis added)

33. The magistrate also indicated that he took into account all of the circumstances of the case, including the testimonials received on the appellant’s behalf. In addition, the magistrate noted that the maximum sentence for the offence under the **Larceny Act** was imprisonment for a period of 5 years.

34. The magistrate directed his mind to the relevant circumstances of the case, including the factors in relation to the offence and the offender. Given that the sentencing took place before the decision in **Aguillera**¹³, the magistrate cannot be faulted for not applying the relevant principles set out in

¹² (2011) 1 Cr. App. Rep. (S) 112

¹³ **Aguillera** (n 9).

that case. The magistrate also directed himself to the helpful case of **R v Yates**¹⁴ and clearly identified the various factors that he put into the balance in arriving at the sentence. In our view, the sentence ultimately arrived at, that is, 40 months imprisonment with hard labour, was within a range of reasonable sentences. As such, we see no reason to interfere with the magistrate's decision on sentencing.

This ground of appeal is without merit.

Disposition:

35. The appeal is dismissed. The orders of the magistrate relative to both the conviction and sentence are affirmed.

R. Narine, J.A.

M. Mohammed, J.A.

¹⁴ **Yates** (n 12).