Entered

5-11-2010

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

S.C.A. No. 48 of 2008

MARLENE BOVELL-SWANSON

V.

REGINA

Appearances: **Mr. Anthony Akiwumi of Stuarts Walker Hersant for the Appellant**

Mr. John Masters of the Government Legal Department for the Crown, the Respondent

Before: **Hon. Justice Henderson**

Heard: **December 10, 2009**

GRAND COURT - CAYMAN ISLANDS

JUDGMENT

1. On December 10, 2009 I delivered a judgment in this case in which I directed a new trial in the Summary Court. Upon the Crown's appeal to the Court of Appeal, that order was set aside and the appeal was remitted to me for determination of the issues which have not already been decided.

2. Ms. Bovell-Swanson was tried in the Summary Court on three similar charges of theft. The first such charge read that she was:

> "'charged with the following offence: Theft
> Contrary (sic) 235(1) of the *Penal Code*, (2006 Revision)

Particulars of Offence

> On or about the 14th September, 2006, you stole $2,000 from the Cayman Islands Crises (sic) Centre, namely by writing a Cayman Islands Crises Centre cheque for that amount in your maiden name and subsequently cashing it.'

The second and third charges were identical except that they alleged the theft of $1,500 and $2,500 on September 28th and October 31st, 2006 respectively.

3. The crux of the case for the Crown was presented by Mr. Lendell Layman, the Chairman of the Board of the Cayman Islands Crisis Centre. He said that Ms. Bovell-Swanson worked on the night shift at the Centre and, when the Executive Director left in July, 2006, was appointed Acting Executive Director. Although Ms. Bovell-Swanson did not have authority to sign cheques on behalf of the Centre, it was customary for her to fill out the cheques and present them to board members for signature. The degree of trust reposed in her was such that the board members did not feel the need to question the cheques before signing them.

4. The three cheques in question were made out by Ms. Bovell-Swanson herself and made payable to "Ingrid Welch." That is her maiden name, a fact which was entirely unknown to any of the Board members (including Mr. Layman) who were invited to sign the cheques. It was admitted that Ms. Bovell-Swanson cashed the cheques and used the proceeds for her own purposes. The Crown says she was never authorized to do so.

5. In her defense, Ms. Bovell-Swanson testified that the three cheques represented legitimate payments to her for consulting services which had been agree upon in advance by Mr. Layman.

6. Upon the initial appeal, there was considerable debate about whether the Magistrate had ordered an amendment to the charges. In light of the Court of Appeal's judgment it is beyond debate that she did not do so. The remaining issues must be approached on the footing that the charges remained in their original form throughout the proceeding.

<u>Issues</u>

7. The issues are:

1) At the end of the Crown's case, was there a case to answer?
2) Did the Learned Magistrate err in permitting the Crown to adduce further evidence (after the No Case submission) to repair an apparent deficiency in its case?
3) Was the evidence sufficient to prove the acts of theft?
4) Did the Learned Magistrate err in failing to make express reference to the possible defence of claim of right?
5) Did the Learned Magistrate err in failing to place sufficient weight upon the previous good character of Ms. Bovell-Swanson?
6) Did the Learned Magistrate err in failing to give herself the "Lucas" warning?
7) Did the Learned Magistrate err in failing to make specific reference to the decision in *Ghosh*?

<u>Issue 1</u>: At the end of the Crown's case, was there a case to answer?

8. A person commits theft if she dishonestly appropriates "property" belonging to another with the intention of permanently depriving the other of it: *Penal Code* (2006 Revision), section 235 (1). The definition of property is found in section 238 (1) of the *Penal Code* which reads: " '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."

9. The charges did not specify the sort of property Ms. Bovell-Swanson was alleged to have stolen. Each of the three items of property was identified only by a reference to its value: $2,000, $1,500, and $2,500 respectively. Without further particularization, the charges could be read as describing any sort of property contained within the statutory definition, including a chose in action. Ms. Bovell-Swanson made no motion to quash the charges and no application for particulars. When she commenced her submission of No Case to Answer, her Counsel identified the subject of the charges and characterized it correctly as a "debt due to the holder of the bank account" (Appeal Bundle, page 83). The Crown agreed with and accepted this characterization. Thus, it cannot be said that Ms. Bovell-Swanson was in doubt as to the nature of the charges against her and she has suffered no prejudice by the lack of precision in their wording.

10. Mr. Wilson, for the Defendant, anticipated that the Crown would apply to amend the charges (which it did not) and proceeded to argue that an amendment should not be permitted. He also said that even if the charges were amended to make express reference to a chose in action the case would still fail because there was no evidence that, when the cheques were presented for payment, the account contained a credit balance which was capable of being stolen. That argument was based upon the decision of the Court of Appeal (Criminal Division) in *Regina v. Kohn* (1979) 69 CR. App. R. 395, which has been adopted and applied by the Cayman Islands Court of Appeal in *Pearson v. R.* 2000 CILR 413.

11. Kohn was charged with theft contrary to the *Theft Act* 1968. He was acting as an accountant for various companies and was alleged to have used company cheques to withdraw various sums from the corporate bank accounts for his own use without any entitlement to do so. One argument advanced on appeal was that the terms of the *Theft Act* were not sufficiently broad to apply to the theft of a debt owed by a bank to one of its customers, i.e., of a chose in action. In rejecting that argument, the Court considered that the state of the account at the point in time at which the cheque is presented for payment is crucial. The Court quoted with approval from the *Theft Acts* 1968 and 1978 (Third Edition, 1978) paragraphs 2-11, by Professor Griew to this effect:

> "The case of an employee (D) who has authority to draw on his employer's (P's) bank account and who dishonestly draws on it for unauthorized purposes seems also to be theft (assuming the account to be in credit). D has in some manner appropriated the debt owed by the bank to P. Although nothing in the transaction operates as an assignment of that debt to D, it would seem that D has appropriated the debt or part of it by causing P's credit balance to be diminished or at

> the very least taking the risk of such diminution. The case is analogous to the theft of a chattel by destruction."

12. The Court had little difficulty concluding that, provided the account had a credit balance when the cheque was presented for payment, the act of theft was complete.

13. Some of the cheques presented by Mr. Khon were presented at a time when the account was overdrawn but the amount of the cheque was within the agreed limits of the overdraft. On this branch of the case the court concluded:

> "If the account is in credit, as we have seen, there is an obligation to honour the cheque. If the account is within the agreed limits of the overdraft facilities, there is an obligation to meet the cheque. In either case it is an obligation which can only be enforced by action. For purposes of this case it seems to us that that sufficiently constitutes a debt within the meaning of the word as explained by Lord Reid. It is a right of property which can properly be described as a thing in action and therefore potentially a subject of theft under the provisions of the 1968 Act. The cheque is the means by which the theft of this property is achieved. The completion of the theft does not take place until the transaction has gone through to completion."

14. One count of theft against Mr. Khon was in relation to a cheque which was presented to the bank at a time when the account balance was over the agreed overdraft limit. With respect to this cheque, the Court held:

> "The situation here is that there is no relationship of debtor and creditor, even notionally. The bank has no duty to the customer to meet the cheque. It can simply mark the cheque "refer to drawer." It can decline to honour the cheque. The reasons for that are obvious. If then a bank declines to honour a cheque, there is no right of action in the customer. If they do as a matter of grace - that is all it can be - honour the cheque then that is a course which does not retrospectively create any personal right of property in the customer and does not create any duty retrospectively in the bank. It seems, therefore, on that bald statement of principle, that this count which alleges a theft of a thing in

> action when the account was over the agreed limit must be quashed, unless some external reason can be found for saving it."

15. Further elaboration on these principles can be found in *Regina v. Williams* [2001] Crim. L.R .253 (Court of Appeal); *Regina v. Ngan* [1998] Cr. App R. 331 (Court of Appeal); and "*Cheques and Balances*", Russell Heaton, *Criminal Law Review*, 2005, page 747.

16. When the No Case to Answer submission was first made, there was no evidence on the record as to the state of the bank account balance when the three cheques written by Ms. Bovell-Swanson were presented for payment. The account might have been in credit, it might have been overdrawn but within the terms of an agreed overdraft, or it could have been overdrawn above the agreed limit. Either of the first two circumstances would support a conclusion that Ms. Bovell-Swanson had misappropriated a chose in action; the third circumstance would not. Since the Learned Magistrate had (at that point) no basis in the evidence for inferring the state of the account balance, she would have been bound to accede to the No Case submission unless the evidentiary record was supplemented. Ms. Bovell-Swanson is correct in saying that there was indeed No Case to Answer prior to the case being re-opened.

17. In the result, the Crown was permitted to re-open its case to repair the deficiency.

Issue 2: Did the Learned Magistrate err in permitting the Crown to adduce further evidence (after the No Case submission) to repair an apparent deficiency in its case?

18. Mr. Kyle McLean, the treasurer of the Crisis Centre, gave evidence for the Crown (prior to the No Case submission) concerning the financial arrangements made with Ms. Bovell-Swanson. After hearing from both counsel on the No Case submission, the Learned Magistrate permitted the Crown to re-open its case to recall Mr. McLean and to enter the Witness Statement of C.Y. Elliott to fill the gap in the evidence.

19. Mr. McLean began his additional testimony by producing the three cancelled cheques written and cashed by Ms. Bovell-Swanson using her maiden name. Markings on the backs of all three cheques indicate that the cheques were honoured upon presentation.

20. The witness statement of Mr. C.Y. Elliott, Compliance Manager at the Cayman National Bank, was read by consent. That evidence provided a foundation for the admission in evidence of the relevant bank statements of the Crisis Centre. Those statements (exhibit 9) demonstrate that the bank account was in a credit position before and after each of the three cheques was cashed.

21. The Crown then closed its case for the second and final time and the Defendant gave evidence.

22. Ms. Bovell-Swanson says that the Learned trial judge was wrong to permit the Crown to re-open its case. She cites the leading authority of *Regina v. Francis* [1990] 1 WLR 1264 (Court of Appeal) which contains the following exposition of the rules:

> "Mr. Thomas buttressed his argument by referring us to a number of authorities, starting with *Rex. v. Day* [1940] 1 All E.R. 402 and culminating in the case of *Reg. v. Central Criminal Court, Ex parte Garnier* [1988] R.T.R. 42. The propositions which can be deduced from those authorities are as follows. (1) The general rule is that the prosecution must call the whole of their evidence before closing their case. The rule has been described as being most salutary. (2) There are, however, exceptions. The best known exception is that the prosecution may call evidence in rebuttal to deal with matters which have arisen ex improviso: see *Reg. v. Pilcher* (1974) 60 Cr. App R.1. (3) The prosecution do not have to foresee every eventuality. They are entitled to make reasonable assumptions: see *Reg. v. Scott* (1984) 79 Cr. App. R. 49. (4) Another exception to the general rule is where what has been omitted is a mere formality as distinct from a central issue in the case: contrast *Royal v. Prescott-Clarke* [1966] 1 W.L.R. 788 with *Reg. v. Central Criminal Court, Ex parte Garnier* [1988] R.T.R. 42. (5) In cases within the two above exceptions the judge has a discretion to admit the evidence. Like any other discretion it must be exercised judicially and within the principles which have been established by the Court of Appeal. If the discretion is exercised in a way that no reasonable judge or no reasonable bench of magistrates could have exercised it, the decision will be set aside as erroneous in law: *see Royal v. Prescott-Clarke* [1966] 1 W.L.R. 788. (6) The earlier the application to admit the further evidence is made after the close of the prosecution case the more likely it is that the discretion will be exercised in favour of the prosecution.
>
> …
>
> In the light of those and other authorities we would venture to add a seventh proposition to those which we have already listed, as follows. (7) The discretion of the judge to admit evidence after the close of the prosecution case is not confined to the two well established exceptions. There is a wider discretion. We refrain from defining precisely the limit of that discretion since we cannot foresee all the circumstances in which it might fall to be exercised. It is of the essence of any discretion that it should be kept flexible. But lest there be any misunderstanding and lest it be thought we are opening the door too wide, we would echo what was said by Edmund Davies L.J.in *Reg. v. Doran* at p. 437, that the discretion is one which should only be exercised outside the two established exceptions on the rarest of occasions.

23. The seventh element in the rules set out in *Francis* – that the discretion to allow the Crown to re-open is not confined to the two well established exceptions – was subjected to a sustained attack in *Regina v. Munnery* (1992) 94 Cr. App. R. 164 (Court of Appeal). The Court re- examined the cases underlining the *Francis* decision and re-affirmed its previous conclusions.

24. The Learned Magistrate's considered reasons for allowing the Crown to reopen its case are contained in her final decision. When setting out the applicable principles, she relied upon *Regina v. Malcolm* [2007] EWHC 363 (Div. CT.)*; Tuck v. Vehicle Inspectorate* [2004] EWHC 728; and *Cook v. DPP* 2000 WL 33116475. These cases were decided well after the *Police and Criminal Evidence Act* 1984 and the *Criminal Procedure and Investigations Act* 1996. Ms. Bovell-Swanson argues that these statutes made "significant incursions" into the right of a defendant to a criminal charge to maintain silence and to refrain from disclosing any aspect of his case to the prosecution. The obligations created by these legislative changes have never been made a part of the law of the Cayman Islands. Since the cases relied upon by the Learned Magistrate represent (at least arguably) a widening of the principles set out in *Francis* and reaffirmed in *Munnery*, Ms. Bovell-Swanson argues that it was an error to accept this modern line of authority as having application in the Cayman Islands. She says that it is the state of the law described in *Francis* which represents the position in the Cayman Islands (although *Francis* was itself decided 6 years after the Police and Criminal Evidence Act of 1984).

25. The degree to which the modern authorities have widened the principles in favour of the Crown must be a matter of some debate. There is, however, no need to resolve the question of whether the decisions in *Malcolm*, *Tuck*, and *Cook* (all *supra*) represent the state of the law in the Cayman Islands because I am satisfied that the earlier authorities cited by Ms. Bovell-Swanson do themselves provide a solid justification in law for the Magistrate's ruling.

26. The two established exceptions mentioned in *Francis* occur where the prosecution seeks to call rebuttal evidence with respect to a matter which has arisen *ex improviso* and where the prosecution seeks to re-open its case to cure the omission of a "mere formality as distinct from a central issue in the case." The evidence of Mssrs. McLean and Elliott was not offered in rebuttal; that evidence was an essential part of the Crown's case in chief. I also doubt that the evidence can be characterized as a mere formality. Although not a central issue, the evidence was entirely necessary because it provides proof of one of the essential elements of the charges.

27. However, rule 7 in the *Francis* decision describes a wider discretion in a trial judge to admit evidence after the close of the prosecution case even where one of the two exceptions just mentioned are not applicable. The Court said that this discretion should be "kept flexible" but also warned that it should only be exercised "on the rarest of occasions."

28. What has been the practical application of the *Francis* principles?

29. In *Francis* itself, the Court of Appeal refused to overturn a decision to permit the Crown to call evidence after the close of its case to show that the accused was the man occupying position twenty in an identification parade. That evidence was crucial to the Crown's case as identification was very much in issue. There was only one identifying witness. His identification of Mr. Francis at the identification parade was an important piece of evidence in the case. Nonetheless, the Crown was permitted to prove that the Defendant was the man standing at position number twenty after it had closed its case and after the defect was identified by defence Counsel in his argument that there was no case to answer. Clearly, the question of identification was not one which arose *ex improviso*. The Court accepted (at page 1269) that the evidence was not a mere formality. The failure to lead the evidence came about because of miscommunication between Crown and defence Counsel as to what was in issue. The Court concluded:

> "In view of that, we do not see how we can say that the Judge did not have a discretion to allow the further evidence to be adduced. Nor can we see how it could be said that that discretion was unlawfully or wrongfully exercised." (at page 1270)

30. It is also noteworthy that the Crown was permitted to re-open its case prior to any evidence being called by the Defendant. The "prejudice" suffered by the Defendant (if it is prejudice – there is a debate in the authorities) was that he was deprived of the opportunity to win an acquittal because of a technical defect in the Crown's case.

31. The decision in *Munnery* is particularly instructive. Like the case of *Francis*, it was decided after the enactment of the *Police and Criminal Evidence Act* 1984 but relies upon authorities decided prior to that date. *Munnery* was

charged with the burglary of a store and the theft of some glasses and jugs. Prior to trial, Counsel for Mr. Munnery warned Crown Counsel that he might make a No Case to Answer submission because the witness statements in his possession revealed insufficient evidence for a conviction. He commenced his submission at the end of the first day and argued that there was no evidence that the items in question had been stolen.

32. The following morning Crown counsel applied for leave to re-open his case and was permitted to call a witness who testified that she took inventory immediately after the theft and found the glasses and jugs missing. This evidence filled the gap. It was evidence which appears to have been available at all times to the Crown; no submission to the contrary was made. Clearly, the evidence went to the heart of the case and was not a mere formality.

33. The Court cited a number of pre-PACE decisions including:

1) *McKenna* (1956) 40 Cr. App. R. 65, in which, on a charge of exporting goods "wholly or mainly of iron or steel", the prosecution was allowed to re-open to prove that the goods in question were indeed made of iron or steel;

2) *Jones v. Carter* [1956] Crim. L.R. 275, in which, on a charge of careless driving, the Crown was allowed to re-open to prove that the motor vehicle was driven by or belonged to the Defendant;

3) *Piggott v. Sims* [1973] RTR 15, in which, on a charge of driving with a blood alcohol level over the prescribed limit, the prosecution was allowed to re-open to prove the actual blood alcohol level;

4) *Matthews v. Morris* [1981] Crim. L.R. 495, in which, on a charge of theft of money, the Crown was allowed to re-open to prove the identity of the owner.

34. The Court summarized the effect of these cases as follows:

"Quite clearly there is nothing in these decisions to sustain the argument for the appellant that the law admits of only two situations in which further evidence may be called, and that the Court in *Francis* (*supra*) was wrong to open up a more general discretion in its proposition (7). Quite the reverse. They demonstrate, as would be expected, that the judge must be left with some degree of freedom to meet the various and unpredictable problems with may arise during a trial. Our only hesitation is whether the extra cases might perhaps have led the court to state its seventh proposition in rather less restrictive terms. On balance we think not, although it might perhaps be expanded by the addition after the concluding words of ' … especially when the evidence is tendered after the case for the defendant has begun." What matters is that the judge should have in the forefront of his mind the strictly adversarial nature of the English criminal process, whereby the cases for the prosecution and the defence are presented consecutively in their entirety. To depart substantially from the normal order of events, unless justice really demands, is liable to cause confusion and hardship. Moreover, as was pointed out in *Francis* and again in the present case, the defendant may be prejudiced if his advisers have identified a gap in the prosecution's evidence, and have drawn attention to it by a submission of no case only to find that the judge gives leave to put it right; whereas if they had kept silent until the time to address the jury the prosecution would have been too late.

These are important considerations which the judge must always bear in mind, but they are not necessarily conclusive. Tactics are a legitimate part of the adversarial process, but justice is what matters: justice to the public, represented by the prosecution, as well as to the defendant. Undeniably, if he had declined to admit the evidence he could not have been criticized. The question is whether by letting it in he stepped outside the reasonable bounds of the discretion and thereby created a real risk of injustice. We consider that he did not. We have well in mind that the evidence was not a 'mere formality' whatever exactly that expression means. It is also true that there was no misunderstanding here, no reasonable assumption that the facts to be proved were not in dispute; the mishap on the first committal had sounded a warning, and on the morning of the trial the prosecution elected to go ahead on the material which they had. All the same, this was not a situation where the evidence was tendered after the defendant's case had begun and it was only chance that the evidence for the prosecution ended before rather than after the overnight adjournment. The real contest in the case was whether the appellant was seen to walk out of Liberty's carrying boxes or whether he might have been drawn into a crime unwittingly. The inference that the boxes taken to the taxi, and the glass inside them, had been carried out of Liberty's was almost irrestible; a submission of no case to answer was very likely to fail; the new evidence did no more than add some (but not much)weight to what was already a strong case on a secondary

> issue. All this being so, although we reiterate that the jurisdiction to admit fresh evidence after the close of the prosecution case might be exercised with great caution, we conclude that the judge did not step outside the bounds of his discretion, and that in any case we are satisfied that no injustice has been caused. Accordingly we dismiss this appeal."

35. The question for me (which is principle number 5 in *Francis*) is whether the Learned Magistrate exercised her discretion in a way that no reasonable magistrate could have exercised it. I must also bear in mind principle number 6: the earlier the application to admit further evidence is made after the close of the prosecution case the more likely it is that the discretion will be exercised in favour of the prosecution.

36. In the present case the application to re-open was made before any part of the defence case was adduced. That is a circumstance favouring the granting of leave. The defence took no issue with the allegation that each of the three cheques was honoured by the bank. Mr. Wilson, for the Defendant, said (Appeal Bundle, page 84) that the "issue is not whether it is property" but whether the person to whom the money belonged has been misidentified. Crown counsel responded that this was "never an issue in the trial". It seems to have been the Defendant's position that, while the subject of the thefts was indeed "property," it was property (cash) which belonged to the bank not to the Crisis Centre. As in two of the authorities cited in *Munnery* – *Jones v. Carter* and *Matthews v. Morris* – the omitted evidence concerned the identity of the owner of property. The objection was technical in nature. Its significance in the case was not materially different from the significance of the evidence omitted by the Crown in *Munnery* and in many of the decisions

upon which it relies. The fact that by allowing the Crown to re-open its case the Learned Magistrate eliminated the possibility of a successful application of No Case to Answer is not determinative. In at least some of the cases cited in *Munnery* the same tactical disadvantage would have been suffered by the defendant. It would be wrong to say that no reasonable magistrate could have exercised her discretion to allow the case to be re-opened.

37. For these reasons, I am of the view that this branch of the appeal must fail as the authorities relied upon by the Appellant herself, excluding any consideration of the modern case law, confirm the entitlement of the Learned Magistrate to rule as she did.

38. There is one final argument to be disposed of on this branch of the appeal. Section 70 of the *Criminal Procedure Code* (2006 Revision) reads:

> "If at the close of the case for the prosecution the court considers that, subject to any fresh matter which might be revealed in the conduct of the defence, the prosecution has established a *prima facie* case, the court shall, if no defence is offered, convict the accused, but, if the court considers that a *prima facie* case on the evidence presented has not been established and the accused offers no defence, or submits that there is no case to answer, the court <u>shall</u> acquit the accused." (underlining added)

The concluding phrase of section 70, "the court shall acquit the accused", appears on its face to leave no room for the granting of leave to the Crown to re-open its case after a No Case submission has been made and the magistrate has taken a view of the issue favourable to the defendant. Use of the word "shall" in a statutory provision usually, but not invariably, constitutes a mandatory direction.

38. Counsel was unable in argument to point to any prior decision or statutory provision which justifies a reading of section 70 so as to eliminate the discretion a magistrate would otherwise have to permit a re-opening of the Crown's case so the point must be addressed in the round.

39. Section 70 must be read in its context. It appears in Part 4 of the *Criminal Procedure Code* which describes in abbreviated form the procedure to be followed in Summary Court trials. Many of the provisions in Part 4 assert that if a certain situation exists, the Court "shall" proceed in a certain way. These provisions are presented in summary form and are not intended to be a complete and exhaustive code. In my view, the Legislative Assembly did not intend by section 70 to remove the well established discretion accorded to a magistrate by the decided authorities.

<u>Issue 3</u>: Was the evidence sufficient to prove the acts of theft?

40. Ms. Bovell-Swanson gave evidence in her defence.

41. Upon her appointment as Acting Executive Director, she had a discussion with Mr. Layman (who was speaking for the Board) about her terms of employment. She said that she considered the salary too low in light of her qualifications. She made reference to "the bad state of the Centre" and pointed out that it "was beyond the stated duties of the Executive Director" to "improve conditions" there. Ms. Bovell-Swanson says she told Mr. Layman

that she would do her best to improve those "deplorable" conditions and proposed that she should be paid an additional "consultancy fee" for this work. She asserted that Mr. Layman agreed upon a fee of "between $2,000 - $3,000 per month" for "a maximum period of three months."

42. She then said that the two of them came to an agreement as to how these payments should be made. Every pay period "or so" Ms. Bovell-Swanson would submit a cheque payable to "Ingrid Welch" and present it for signature. As to the use of her maiden name on the cheques, Ms. Bovell-Swanson said that this was done to conceal the arrangement from other Board members and from the person who would ultimately be hired as Executive Director.

43. She said she was not interested in obtaining a permanent appointment as Executive Director. The arrangement was to be concealed from the other Board members because it represented additional remuneration of which they would not approve; it was to be concealed from the new appointee to avoid the possibility that this person might insist on the same arrangement for herself. The salary paid to Ms. Bovell-Swanson during her tenure as Acting Executive Director was $3,500 per month. Thus, the alleged oral agreement to pay her a consulting fee virtually doubled her remuneration.

44. When asked about the additional duties she had performed which fell outside those which might be expected of the Executive Director by virtue of her position, Ms. Bovell-Swanson said that she met with the Fund-Raising Committee whenever they wanted to meet, she arranged to get some flowers

to brighten up the Crisis Centre, and she worked on weekends at the Centre to clean the place up and attend to a sewage problem. She also described a report she had written on "marketing strategy" and a PowerPoint presentation on the same subject which she made to the Board of Directors.

45. Mr. Layman rejected categorically the assertion that he had entered into a separate, oral agreement with Ms. Bovell-Swanson to pay her additional remuneration. He accepted that she had raised with him the fact that she felt the salary was too low but denied that there was any discussion about consultancy work, overtime pay, or any remuneration beyond the usual salary. He said he had no authority to vary the terms of her employment. Mr. Kyle McLean, another Board member who also signed the three cheques, emphasized that the Board had a great deal of trust in its Acting Executive Director and that there was "no proper accounting system."

46. The Learned Magistrate did not believe Ms. Bovell-Swanson's evidence (which was unsupported by any other evidence), and found that the Crown had proved its case on all three charges.

47. After the Crown closed its case for the second time, there was a *prima facie* case that Ms. Bovell-Swanson had, on three occasions, misappropriated a part of the credit balance standing to the credit of the Crisis Centre at its bank by presenting the three cheques for payment and by using the money to benefit herself. Her defense, essentially, was that she was entitled to the money as part of her remuneration because of the agreement she had made with Mr.

Layman. In her detailed review of the evidence, the Learned Magistrate rejected the Defendant's evidence concerning an oral contract for consultancy services and found that she had no doubt about Mr. Layman's credibility. On the evidence, that conclusion was entirely justified.

<u>Issue 4</u>: Did the Learned Magistrate err in failing to make express reference to the possible defence of claim of right?

47. Section 236 (1) of the *Penal Code* (2006 Revision) reads in part:

> "A person's appropriation of property belonging to another is not to be regarded as dishonest –
>
> (a) if he appropriates the property in the belief that he has in law the right to deprive the other of it on behalf of himself or of a third person;
>
> (b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it..."

48. Ms. Bovell-Swanson's submission on this ground was confined to a citation of the section quoted above and references to her evidence.

49. When the alleged agreement for additional remuneration was put to Mr. Layman in cross-examination he denied it entirely. He accepted only that Ms. Swanson "questioned" the amount of her salary before agreeing to it. The evidence of Ms. Bovell-Swanson concerning the existence of the "oral contract" was rejected in its entirety. The result is that there was no room for a conclusion by the Learned Magistrate that Ms. Bovell-Swanson took the money because she had a sincere, albeit mistaken, belief that she had a right to it on the basis of her agreement with Mr. Layman. Neither was there any

room for a conclusion that she took the money in the sincere but mistaken belief that she would have had Mr. Layman's consent if he knew of the appropriation and the circumstances of it. The finding of fact that Ms. Bovell-Swanson's version of the conversation with Mr. Layman was untrue eliminated the need for any consideration of a defense of claim of right.

<u>Issue 5</u>: Did the Learned Magistrate err in failing to place sufficient weight upon the previous good character of Ms. Bovell-Swanson?

50. It was conceded that Ms. Bovell-Swanson was a defendant of good character in the sense that she had no prior criminal convictions. In assessing her credibility, the Learned Magistrate said (at page 128): "I remind myself that her character is relevant both to her credibility and to the issue of the likelihood of her having committed the offense charged." Later, she added: "there is a certain irony in the fact that her good character, to which I have referred, was precisely the thing that caused them to repose such trust in her as enabled her to carry out the thefts."

51. Ms. Bovell-Swanson says that the Learned Magistrate erred in two ways:

1) By "reversing the good character direction to provide corroboration of the basis of the Crown's case"; and

2) by "failing to state adequately or at all her reasons for disregarding the effect of the good character direction".

52. Although these grounds were advanced, virtually no argument was addressed to them save for a passing reference to Blackstone and reliance on *Regina v. Walker* 2006 CILR note 27. Walker was a case in which a trial judge failed to

direct the jury to take into account the evidence of good character and equally failed to admonish them to disregard certain hearsay evidence of bad character. It has no application to the present case.

53. The Learned Magistrate's comment concerning the irony that Ms. Bovell-Swanson's previous good character "enabled her to carry out the thefts" was not in any sense a "reversing" of the effect of the good character direction. There is no merit in that argument.

54. The second point made by Ms. Bovell Swanson assumes that the Learned Magistrate disregarded the effect of the good character evidence. There is no reason to believe that she did; she expressly reminded herself of its relevance both to credibility and to the likelihood of having committed the offense. This ground of appeal is without merit.

<u>Issue 6</u>: Did the Learned Magistrate err in failing to give herself the "*Lucas*" warning?

55. This ground was not mentioned in the Notice of Appeal or referred to in the Ms. Bovell-Swanson's written submissions.

56. In oral argument, Mr. Akiwumi advanced the proposition that the Learned Magistrate should have given herself a direction of the sort provided for in *Regina v. Lucas* (1981) 73 Cr. App. R. 159 (Court of Appeal).

57. The appropriate direction to a jury is found in section 27 of the Specimen Directions published by the Judicial Studies Board. The section begins with a warning that the direction should be given to juries only "in appropriate cases" and will tend to do more harm than good if given where it is not needed. Footnote 1 to the standard direction begins with the statement:

> "If the inevitable consequence of the jury having found that the Defendant has told lies is that he is guilty of the offense charged no separate direction is required."

This was such a case. The Crown asserted that Ms. Bovell-Swanson's entire account of her employment arrangements was false. If, as the Learned Magistrate found, it was indeed false, then the accepted evidence of Mr. Layman leads inevitably to the conclusion that the Ms. Bovell-Swanson had no authority to take the additional money and no ground for thinking that she had such authority. There is no merit in this ground of appeal.

<u>Issue 7</u>: Did the Learned Magistrate err in failing to make specific reference to the decision in *Ghosh*?

58. This ground, also, was not mentioned in the Notice of Appeal or in Ms. Bovell-Swanson's written submissions.

59. During oral argument Mr. Akiwumi asserted that the Learned Magistrate should have given herself a direction of the sort found in *Regina v. Ghosh* 75 Cr. App. R. 154 (Court of Appeal). That direction in its approved form is also contained in the Specimen Directions published by the Judicial Studies Board. It is found at section 34. The section opens with these words:

> "Normally it is not necessary to attempt to define dishonesty as an ingredient of an offense. It will suffice simply to tell the jury that

> the word bears its ordinary meaning, which will be well known and understood by all of them.
>
> However, there are exceptional cases in which the Defendant may e.g. claim that his alleged conduct even if proved or admitted was not considered by him to be dishonest. In such cases a direction in accordance with the judgment of Lord Lane C.J. in *R. v. Gosh* 75 Cr. App. R. 154 should be given."

60. Ms Bovell-Swanson did not claim that she knew she was without authority to take the additional money but thought, because of the circumstances, that it was not dishonest to do so. She asserted that she had authority from Mr. Layman to include the additional amounts in her remuneration. The Learned Magistrate found that the conversation testified to by Ms. Bovell-Swanson never occurred. This decision is not in any sense exceptional and does not call for a special direction concerning the standards of honesty or her likely understanding of those standards. There is no merit in this ground of appeal.

Order

61. For these reasons, the appeal from conviction is dismissed.

62. Ms. Bovell-Swanson has appealed against her sentence but that appeal has not yet been argued. Either party may set down the sentence appeal for hearing at an early date.

Dated this 5th day of November, 2010

Henderson, J.

Henderson, J.
Judge of the Grand Court

GRAND COURT - CAYMAN ISLANDS