

2-MAR-10
(15)

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

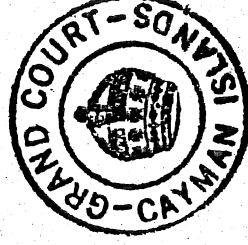
Mr. John Masters of the Government Legal Department for the
Crown, Respondent

Before:

Hon. Justice Henderson

Heard:

December 10, 2009



JUDGMENT

1. This appeal concerns the manner in which a charge may be amended in the Summary Court during a trial.
2. Ms. Bovell-Swanson was tried in the Summary Court on three similar charges of theft. The first such charge read that she was:

Judgment – *Marlene Bovell-Swanson v. Regina* S.C.A. No. 48 of 2009 02.03.10

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

3 Particulars of Offence

4 On or about the 14th September, 2006, you stole \$2,000
5 from the Cayman Islands Crises (sic) Centre, namely by
6 writing a Cayman Islands Crises Centre cheque for that
7 amount in your maiden name and subsequently cashing it.”
8

9 The second and third charges were identical except that they alleged the
10 theft of \$1,500 and \$2,500 on September 28th and October 31st, 2006
11 respectively.
12

13 3. The crux of the case for the Crown was presented by Mr. Lendell Layman,
14 the Chairman of the Board of the Cayman Islands Crisis Centre. He said
15 that Ms. Bovell-Swanson worked on the night shift at the Centre and,
16 when the Executive Director left in July, 2006, was appointed Acting
17 Executive Director. Although Ms. Bovell-Swanson did not have authority
18 to sign cheques on behalf of the Centre, it was customary for her to fill out
19 the cheques and present them to board members for signature. The degree
20 of trust reposed in her was such that the board members did not feel the
21 need to question the cheques before signing them.
22

23 4. The three cheques in question were made out by Ms. Bovell-Swanson
24 herself and made payable to “Ingrid Welch.” That is her maiden name, a
25 fact which was entirely unknown to any of the board members (including
26 Mr. Layman) who were invited to sign the cheques. It was admitted that
27 Ms. Bovell-Swanson cashed the cheques and used the proceeds for her
28 own purposes.

1
2 5. In her defense, Ms. Bovell-Swanson testified that the three cheques
3 represented legitimate payments to her for consulting services which had
4 been agree upon in advance by Mr. Layman. She said that she has a
5 Bachelor of Science degree in social work, a Masters degree in human
6 resource management, and a Law degree with honours. While working at
7 the Crisis Centre at night, she was going to law school during the day.
8
9 6. Upon her appointment as Acting Executive Director, she had a discussion
10 with Mr. Layman (who was speaking for the board) about her terms of
11 employment. She said that she considered the salary too low in light of
12 her qualifications. She made reference to "the bad state of the Centre" and
13 pointed out that it "was beyond the stated duties of the Executive Director"
14 to "improve conditions" there. Ms. Bovell-Swanson says she told
15 Mr. Layman that she would do her best to improve those "deplorable"
16 conditions and proposed that she should be paid an additional "consultancy
17 fee" for this work. She asserted that Mr. Layman agreed upon a fee of
18 "between \$2,000 - \$3,000 per month" for "a maximum period of three
19 months." She then said that the two of them came to an agreement as to
20 how these payments should be made. Every pay period "or so" Ms.
21 Bovell-Swanson would submit a cheque payable to "Ingrid Welch" and
22 present it for signature. As to the use of her maiden name on the cheques,
23 Ms. Bovell-Swanson said that this was done to conceal the arrangement
24 from other board members and from the person who would ultimately be
25 hired as Executive Director.

1
2 7. She said she was not interested in obtaining a permanent appointment as
3 Executive Director. The arrangement was to be concealed from the other
4 board members because it represented additional remuneration of which
5 they would not approve; it was to be concealed from the new appointee to
6 avoid the possibility that this person might insist on the same arrangement
7 for herself. The salary paid to Ms. Bovell-Swanson during her tenure as
8 Acting Executive Director was \$3,500 per month. Thus, the alleged oral
9 agreement to pay her a consulting fee virtually doubled her remuneration.
10

11 8. When asked about the additional duties she had performed which fell
12 outside those which might be expected of the Executive Director by virtue
13 of her position, Ms. Bovell-Swanson said that she met with the Fund-
14 Raising Committee whenever they wanted to meet, she arranged to get
15 some flowers to brighten up the Crisis Centre, and she worked on
16 weekends at the Centre to clean the place up and attend to a sewage
17 problem. She also described a report she had written on “marketing
18 strategy” and a PowerPoint presentation on the same subject which she
19 made to the board of directors.
20

21 9. Mr. Layman rejected categorically the assertion that he had entered into a
22 separate, oral agreement with Ms. Bovell-Swanson to pay her additional
23 remuneration. He accepted that she had raised with him the fact that she
24 felt the salary was too low but denied that there was any discussion about
25 consultancy work, overtime pay, or any remuneration beyond the usual

1 salary. He said he had no authority to vary the terms of her employment.
2 Mr. Kyle McLean, another board member who also signed the three
3 cheques, emphasized that the board had a great deal of trust in its Acting
4 Executive Director and that there was “no proper accounting system.”
5
6 10. The Learned Magistrate did not believe Ms. Bovell-Swanson’s evidence
7 (which was unsupported by any other evidence), and found that the Crown
8 had proved its case on all three charges.
9
10 11. The first three grounds of appeal concern events which occurred
11 immediately after the Crown closed its case. Ms. Bovell-Swanson argued
12 that there was no case to answer because the Crown had failed to prove a
13 necessary ingredient of the offence of theft. Citing *Regina v. Kohn* (1979)
14 69 Cr App R 395 (Court of Appeal), she said that the charges were
15 defective because they should have, but did not, alleged the theft of a
16 *chose in action*, i.e., the debt owed by the bank to its customer, the Crisis
17 Centre. For further elaboration on this point, see *R. v. Williams* [2001]
18 Crim LR 253 (Court of Appeal); *R. v. Ngan* [1998] 1 Cr. App R 331
19 (Court of Appeal); and “*Checks and Balances*”, *Russell Heaton, Criminal*
20 *Law Review*, 2005, page 747.
21
22 12. The Learned Magistrate accepted this argument. She then rejected a
23 submission by the defendant opposing any amendment of the charges and
24 “invited” the Crown to amend them (Reasons for Judgment, page 121).
25

13. The Crown has asserted before me that no request was made by it at any time for an amendment. The record supports that assertion. It contains no indication that the defendant was asked to plead to amended charges (as is required by section 74 (1), *Criminal Procedure Code*, 2006 Revision) or that any amendments were reduced to writing and made a part of the record. I have searched through the record in vain for some clear exposition of how the charges, in their “amended” form, are worded.

14. The Learned Magistrate then turned her attention to a further submission by Ms. Bovell-Swanson that there was no case to answer to the charges in their amended form. That submission was accepted. The Crown had already asked for leave to re-open its case, a request which the defendant opposed. The Learned Magistrate decided that the request should be granted. The Crown then re-called Mr. McLean, who said that he was Treasurer of the Crisis Centre at the material time and that the three cheques were honoured by its bank. This evidence was intended to remove the difficulty identified in the authorities mentioned above.

15. After convicting the defendant, the Learned Magistrate sentenced her to imprisonment for twenty-one months on each count, the sentences to run concurrently.

16. In summary, the defendant has been convicted and imprisoned on three “amended” charges in circumstances where the Crown never requested an amendment, the amendment has not been reduced to writing, and the

1 defendant was not re-arraigned, in contravention of the mandatory
2 requirements of section 74.
3
4
5 17. I accept that a court may order the amendment of a charge or an indictment
6 on its own motion, even in circumstances where the Crown does not wish
7 that to happen. It is, however, essential that any amendment of substance
8 be reduced to writing so that the parties and the court understand clearly
9 what it is that the Crown must prove. A charge cannot be amended in the
10 abstract; the party seeking the amendment should propose express
11 wording. If the court amends a charge of its own motion, the presiding
12 judge or magistrate should ensure that the wording of the amendment is
13 made clear to both parties. All amendments, even trivial ones, must form
14 part of the written record. While a failure to follow the re-arraignment
15 process mandated by section 74 may be excusable in the case of very
16 trivial amendments, such as those which correct a typing or spelling error,
17 there was no justification for a failure to follow it here.
18
19 18. Without a clear understanding of the final wording of the charges, I am
20 unable to resolve the remaining grounds of appeal. The collective impact
21 of these irregularities satisfies me that the convictions cannot stand.
22
23 19. The Crown has asked that, should the convictions be set aside, I order a re-
24 trial in the Summary Court. Section 181 of the *Criminal Procedure Code*
25 (2006 Revision) authorizes me to do that.

1 20. The flawed process which I have described can be attributed partly to
2 Ms. Bovell-Swanson's attorney (who was not her attorney on the appeal),
3 who advanced an argument against the Crown's right to amend when the
4 Crown had made no such application. He anticipated an argument which
5 was never made and contributed to the confusion. Given the position of
6 trust in which the defendant was placed, the charges of theft are relatively
7 serious. The evidence was not at all lengthy. In light of these
8 considerations, I am persuaded that the proper disposition of this appeal is
9 to order a re-trial on all three counts, which I now do.

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11 Dated this 2nd day of March, 2010

12
13 *Henderson, J.*

14 Henderson, J.
15 Judge of the Grand Court
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