THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CRIMINAL JURISDICTION)

CASE NO. ANUHCR 2023/0081

BETWEEN:

THE KING

and

DYLAN SIMON

Appearances:

Mrs. Shannon Jones-Gittens, Director of Public Prosecutions, (Ag) Counsel for the Crown
Mr. Lawrence Daniel, Counsel for the Defendant

2024: September 27th,
October 2nd.

SENTENCING RULING

[1] **BAKRE, J.:** The accused, Dylan Simon was charged on an amended eight count indictment dated 20th February, 2024 but found guilty on the following two counts:-

a. Electronic forgery, contrary to section 6 of the **Electronic Crimes Act, 2013**.

Particulars of Offence

Dylan Simon, between 1st and 31st day of the December 2019 in Antigua and Barbuda, with intent to defraud, input computer in the cash receipts register of the Accounting system of Hadeed Motors Ltd., to wit an entry of Antigua Commercial Bank cheque number 91350 for $62,000 ECC as being received from Lervie Joseph as payment for a used Nissan Xtrail vehicle when no such cheque existed thereby resulting in inauthentic data.

b. **FORGERY**, Contrary to Section 7 of the **Forgery Act**, Cap 181 of the Revised Edition (1992) of the Laws of Antigua and Barbuda.

Dylan Simon between the 1st and the 19th day of December, 2019 in Antigua and Barbuda, with intent to deceive, forged the signature of Lervie Joseph on Hadeed Motors Ltd. Exit/ Entry form bearing the number 18232 relating to used Nissan X Trail vehicle, registration number A44950."

Summary of Fact

[2] The accused was an account staff with Hadeed Motors. He worked with the company for over 20 years and spent a considerable length of time in the accounts department. The accused used his position and skill to manipulate the accounting system in the organization.

[3] He inputted into the computer data of the company with intent to defraud, a cheque purporting to be the payment for the cost of a car while the said cheque in actual fact did not exist and was never paid into the company's account.

[4] He also forged the signature of one Lervie Joseph who he had used his name to do the fraudulent transaction on the company's account, to bring the car out of the premises of Hadeed Motors.

[5] The accused, Dylan Simon was convicted for the offences of electronic forgery and forgery while he was acquitted of the other counts on the indictment.

Principles of Sentencing

[6] The four principles of sentencing are well known. Sir Dennis Byron, CJ, (as he then was) in the consolidated appeal, **Desmond Baptiste vs The Queen** (Saint Vincent and the Grenadines High Court Criminal Appeal No. 8 of 2003) outlined the principles of sentencing as:

a) Retribution.
b) Deterrence (general and specific)
c) Prevention.
d) Rehabilitation.

[7] While the Court will bear in mind all the principles in arriving at an appropriate sentence it appears to me that the principles of deterrence, retribution and prevention are the ones most relevant to the present case.

Plea in Mitigation

[8] At the sentencing hearing of the 27th September, 2024 the acting DPP read out the sentencing brief for this exercise. Counsel to the accused, Daniel Lawrence Esq. also made a plea in mitigation of the sentence on behalf of the accused. He urged the court to consider a non-custodial sentence for the offence. He stated that the offence was committed basically out of indiscretion and a total lack of

judgment. Counsel stated that from the facts and the judgment of the court, it was clear that the offence arose because there were no proper guidelines in the company to prevent such an act.

[9] Counsel urged the Court to consider the devastating effect that a custodial sentence would have on the accused who is a first time offender and that he should be given an opportunity to redeem himself not withstanding that he fell into this error of judgment.

[10] Mr. Lawrence Daniel stated that the accused being an accountant is already tainted with the conviction of fraud and would be totally affected if given a custodial sentence. He urged the Court to consider a fine in this regard.

The Law

[11] The offence of electronic forgery is governed by Section 6 of the Electronic Crimes Act, 2013 which provides for a maximum penalty of a fine of Five Hundred Thousand dollars ($500,000) or seven (7) years imprisonment, or both.

[12] The other offence of forgery is governed by Section 7 of the **Forgery Act**, Cap.181 which provides a maximum penalty of two (2) years imprisonment.

Sentencing Guidelines

[13] This Court is guided by the Sentencing Guidelines of the Eastern Caribbean Supreme Court, 2019 (re-issued on 8th November, 2021) for dishonesty offences, more specifically, fraud. Hereafter follows the applicable steps to be followed by the Court to reach an appropriate sentence in the matter.

First Stage -Harm

[14] This stage is to consider the consequences of the offence by assessing the harm caused. Harm is to be assessed in relation to any impact caused by the offending and the actual or intended gain to the offender. Regard must be had to the loss and damage, physical or psychological, caused or intended to be caused, or as risk of harm that might foreseeably have been caused, by the offence.

[15] It should be noted that risk of harm is to be treated as less serious than actual harm. Where there has simply been a risk, the normal approach will be to move down to the next category of harm. However, it may not be appropriate where the likelihood or extent of potential harm is particularly high.

[16] In this instance, the harm is considered as category 2- Medium, as the offence have a significant impact on shared sense of honesty.

Second Stage- Seriousness

[17] The second stage is to consider the seriousness of the offence by assessing the culpability of the offender. Culpability will assess the offender's role and the extent to which the offence was planned and the sophistication of the operation.

[18] There are three categories which range from Level A-High, Level B - Medium and Level C – Lesser.

[19] At this stage, the offence is also categorized in to B-Medium because it involved some degree of planning and also involved a degree of breach of trust. The accused being an accountant has been found liable for breach of trust.

Third Stage- Starting Point

[20] The Court will now find the starting point by the use of the two findings in stages one and two. The offence of electronic Forgery attracts 7 years imprisonment while forgery attracts 2 years imprisonment. Based on the harm and seriousness, the starting points would be 40% with the range from 25% to 55% for each of the offences.

[21] As stated, the interplay of the harm caused and the seriousness of the offences placed the offences at 40%, thus for the offence of electronic forgery, the starting point will be 2 years and 10 months while for the offence of forgery, it will be 10 months. This would be considered with a range of 25%-55%.

Fourth Stage-Aggravated and Mitigating Factors

[22] The Court will now have to determine if it finds any further aggravating factors and if any mitigating factors exist in relation to the offence and the offender.

[23] Aggravating factor in relation to the offence of Electronic Forgery and Forgery:-

1. This offence was committed by the use of another innocent person's (Lervie Joseph) name thereby almost incriminating an innocent person.

[24] Mitigating factor for the offences:-

1. The loss or damage resulting from the act is minimal.

[25] The aggravating and mitigating factors are taken to have cancelled each other out in respect of the offence.

[26] In the view of this Court, there are no aggravating and mitigating factors in relation to the offender.

[27] There is no consideration of guilty plea in this circumstance as the accused went through the trial without pleading guilty.

Consideration of Custodial or Non- Custodial Sentence

[28] At sentencing, a judicial officer has to address several inter-related factors in arriving at a just and reasonable sentence.

[29] In considering a non-custodial sentence, there are a number of issues that would weigh in the mind of a judge. In Commonwealth of Dominica Case No. DOMHCR 2024/0004 between **The State vs. Etinoffe Thomas**. Hon. Justice Colin Williams enumerated a few of the issues to be considered by a court which I find helpful. They are stated as follows:-

> "a. Determine whether or not a custodial sentence is the appropriate sentence in the particular case.
>
> b. Decide whether the decision to impose a custodial sentence ought to be subordinated to other factors, for example the interests of justice, the wishes of the parties, the circumstances of the defendant, or any other factor the judicial officer considers relevant.
>
> c. If there are substantial factors pointing to a departure from the sentencing guidelines, then the reasons for any departure must be fully documented.
>
> d. If the decision is to impose a fine and /or a compensation order instead of a custodial penalty, that fine and/or order of compensation must not have the effect of immediately imprisoning the defendant for noncompliance or inability to meet the terms of the order.
>
> e. A judicial officer imposing a fine or order of compensation on a defendant must conduct a "means test" to ascertain the defendant's ability to pay. The judicial officer must be satisfied as to how and when the defendant would be able to make payment.
>
> f. The default provisions of any fine or order for compensation, that is, the term to be served in prison if there is any breach or non-compliance with the fine or compensation order, must not have the effect of subjecting the defendant to a greater penalty than the custodial sentence which may have been considered to be appropriate in the case"

Sentence

[30] I have availed myself of the guide provided above in **The State vs Etinoffe Thomas** (supra). I am inclined to consider an alternative sentence of fine in this regard. I have also considered the plea in mitigation by counsel to the defendant. I seem to be persuaded by his plea that the accused is a first time offender. He is an accountant who acted based on indiscretion. In view of the above, I am inclined to do a departure from the guidelines give the defendant a second lease of life by an award of fine in lieu of a custodial sentence.

[31] It should be noted that where the court considers the award of fine instead of a custodial sentence, aggravating and mitigating factors may be considered but the percentages found in stages one and two of the guidelines would not be relevant as the award of fine is at the discretion of the Court.

[32] It is in view of this that I make an award of fine as follows:-

1. On count one, in the offence of electronic forgery; the accused is fined the sum of Eighty Five Thousand Dollars ($85,000).

2. On Count two, on the offence of forgery; the accused is fined the sum of Fifteen Thousand Dollars ($15000).

3. A lump sum of Fifty Thousand Dollars ($50,000) shall be paid before the end of October 2024 after which a sum of Ten Thousand Dollars ($10,000) shall be paid monthly from November 2024.

[33] In default, and in view of the fact that there were no aggravating or mitigating factors considered both for the offence and the offender, the offender will serve two years and ten months (2 years and 10 months) imprisonment for Electronic Forgery while for the offence of forgery he shall serve 10 months imprisonment. These sentences will run concurrently and the time already spent on remand will be taken into consideration.

Tunde A. Bakre
High Court Judge

By the Court

Registrar