

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Criminal No. BVIHCR2018/0033

BETWEEN:

THE QUEEN

Applicant

-AND-

JILLIAN FAHIE

Defendant

Appearances: Ms. Tamara Foster Senior Crown Counsel for the Crown
Mrs. Valerie Gordon and Ms. Stacy Abel, Counsel for the Defendant

2019: March 5th, April 9th
May 3rd, 10th

JUDGMENT ON SENTENCING

Headnotes: Criminal law – sentencing – offences of dishonesty – stealing by reason of employment – principles of sentencing – aggravating and mitigating factors – restitution – suspended sentences – particular circumstances of the defendant

[1] **Smith J:** The defendant Jillian Fahie was indicted for Theft contrary to Section 209 (b) of the Criminal Code 1997 as amended of the Laws of the Virgin Islands and False Accounting contrary to section 221 (1) (b) of the said Criminal Code to wit:-

1. **Count one** – False Accounting. Jillian Fahie between 1st January 2015 and 31st January 2015 on the Island of Beef Island, in the Territory of the Virgin Islands and with a view to gain for herself or another or with intent to cause loss to another falsified a document required for an accounting purpose namely official departure tax receipts

by producing receipts which were misleading, false or deceptive in a material particular in that it purported to show that seven hundred and forty dollars (US \$740.00) had been paid by passengers to the BVI Airport Authority.

2. **Count two** – Theft. On a date unknown Jillian Fahie between 1st January 2015 and 31st January 2015 on the Island of Beef Island, in the Territory of the Virgin Islands stole seven hundred and forty dollars (US \$740.00).
3. **Count three** – False Accounting. On a date unknown between 1st February 2015 and 28th February 2015 on the Island of Beef Island, in the Territory of the Virgin Islands, dishonestly and with a view to gain for herself or another or with intent to cause loss to another falsified a document required for an accounting purpose namely official departure tax receipts by producing receipts which were misleading, false or deceptive in a material particular in that it purported to show that nine hundred and forty dollars (US \$940.00) had been paid by passengers to the BVI Airport Authority.
4. **Count four** – Theft. On a date unknown Jillian Fahie between 1st February 2015 and 28th February 2015 on the Island of Beef Island, in the Territory of the Virgin Islands stole nine hundred and forty dollars (US \$940.00) belonging to the BVI Airport Authority.
5. **Count five** – False Accounting. On a date unknown Jillian Fahie between 1st March 2015 and 31st March 2015 on the Island of Beef Island, in the Territory of the Virgin Islands dishonestly and with a view to gain for herself or another or with intent to cause loss to another falsified a document required for an accounting purpose namely official departure tax receipts by producing receipts which were misleading, false or deceptive in a material particular in that it purported to show that one thousand seven hundred and forty dollars (US \$1,740.00) had been paid by passengers to the BVI Airport Authority.

6. **Count six** – Theft. On a date unknown Jillian Fahie between 1st March 2015 and 31st March 2015 on the Island of Beef Island, in the Territory of the Virgin Islands stole one thousand seven hundred and forty dollars (US \$,1740.00) belonging to the BVI Airport Authority.
7. **Count seven** – False Accounting. On a date unknown Jillian Fahie between 1st April 2015 and 30th April 2015 on the Island of Beef Island, in the Territory of the Virgin Islands dishonestly and with a view to gain for herself or another or with intent to cause loss to another falsified a document required for an accounting purpose namely official departure tax receipts by producing receipts which were misleading, false or deceptive in a material particular in that it purported to show that one thousand seven hundred and forty dollars (US \$1,740.00) had been paid by passengers to the BVI Airport Authority.
8. **Count eight** – Theft. On a date unknown Jillian Fahie between 1st April 2015 and 30th April 2015 on the Island of Beef Island, in the Territory of the Virgin Islands stole one thousand nine hundred dollars (US \$1,900.00) belonging to the BVI Airport Authority.
9. **Count nine** – False Accounting. On a date unknown Jillian Fahie between 1st May 2015 and 12th May 2015 on the Island of Beef Island, in the Territory of the Virgin Islands dishonestly and with a view to gain for herself or another or with intent to cause loss to another falsified a document required for an accounting purpose namely official departure tax receipts by producing receipts which were misleading, false or deceptive in a material particular in that it purported to show that three thousand and eighty dollars (US \$3,080.00) had been paid by passengers to the BVI Airport Authority.
10. **Count ten** – Theft. On a date unknown Jillian Fahie between 1st May 2015 and 12th May 2015 on the Island of Beef Island, in the Territory of the Virgin Islands stole three thousand and eighty dollars (US \$3,080.00) belonging to the BVI Airport Authority.

11. **Count eleven** – False Accounting. Jillian Fahie on 13th May 2015 on the Island of Beef Island, in the Territory of the Virgin Islands dishonestly and with a view to gain for herself or another or with intent to cause loss to another falsified a document required for an accounting purpose namely official departure tax receipts by producing receipts which were misleading, false or deceptive in a material particular in that it purported to show that one hundred and forty dollars (US \$140.00) had been paid by passengers to the BVI Airport Authority.

12. **Count twelve** – Theft. Jillian Fahie on 13th May 2015 on the Island of Beef Island, in the Territory of the Virgin Islands stole two hundred and eighty dollars (US \$280.00) belonging to the BVI Airport Authority.

[2] Upon her arraignment, the defendant entered guilty pleas to all counts on the indictment. The matter was set for sentencing on 9th April 2019 and further adjourned for the Court to reduce its sentencing reasons into writing. The Court has now done so.

Summary of Facts

[3] The Complainant, Mr. Dennison Fraser was the Managing Director of the British Virgin Islands (BVI) Airport Authority. The defendant was employed at the British Virgin Islands Airport Authority as a cashier.

[4] In July 2015, Ms. Canya Stoddard was employed as the Financial Comptroller and conducted a series of quality checks on the defendant's departure tax receipts and security tax receipts issued to passengers departing the British Virgin Islands.

[5] Certain discrepancies and irregularities were uncovered, documented with the information being reported to Mr. Dennison Fraser. Mr. Fraser subsequently alerted the Police who attended and cautioned the defendant.

- [6] The defendant indicated that she had indeed created receipts and had done so on one occasion prior. She also informed them that the funds from the fake receipts were in the back office. She was seen to remove funds in the sum of two hundred and eighty dollars (US \$280.00) from her lunch bag.
- [7] An audit was carried out revealing that a total in the amount of eight thousand and four hundred dollars (US \$8,400.00) worth of sales receipts were not reported whilst the defendant was the sole cashier on duty.
- [8] The defendant when interviewed by the police acknowledged and admitted to issuing fake receipts to passengers by making photocopies of the original receipts and selling over the photocopied receipts to passengers for twenty dollars (US \$20.00). She also admitted to concealing money that she had collected in her bra.

The Legal Framework

[9] **Theft:**

The Criminal Code 1997 (No. 1 of 1997) of the Laws of the Virgin Islands—Sections 203 – 209

“Section 203 states:

- (1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it, and “thief” and “steal” shall be construed accordingly.
- (2) It is immaterial whether or not the appropriation is made with a view to gain, or is made for the thief’s own benefit.
- (3) **Sections 204 to 208** shall have effect as regards the interpretation and operation of this section and (except as otherwise provided by this Part) shall apply only for the purposes of this section.”

[10] **“Section 204 states:**

- (1) 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; or

(c) (except where the property came to him as a trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

(2) A person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property.

[11] **"Section 205 states:**

(1) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by dealing with it as its owner.

(2) Where property or a right or interest in property is or purports to be transferred for value to a person acting in good faith, no later assumption by him or rights which he believed himself to be acquiring shall, by reason of any defect in the transferor's title, amount to theft of the property.

[12] **"Section 206 states:**

"Property" includes money, defined, 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.

[13] **"Section 207 states:**

(1) Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).

[14] **"Section 209 states:**

"Any person who commits theft is guilty of an offence and is liable on conviction to imprisonment:

(a) on summary conviction, for a term not exceeding two years; or

(b) on conviction on indictment for a term not exceeding ten years."

[15] **False Accounting:**

The Criminal Code 1997 (No.1 of 1997) of the Laws of the Virgin Islands – Section 221 states that:

“(1) Any person who dishonestly, with a view to gain for himself or another or with intent to cause loss to another,

- a. destroys, defaces, conceals or falsifies any account or any record or document made or required for an accounting purpose, or
- b. in furnishing information for any purpose, produces or makes use of any account or any such record or document, which to his knowledge is or may be misleading, false or deceptive in a material particular, commits an offence and is liable on conviction on indictment to imprisonment for a term not exceeding seven years.

[16] For the purposes of this section, a person who makes or concurs in making in any account or other document an entry which is or may be misleading, false or deceptive in a material particular; or who omits or concurs in omitting a material particular from an account or other document, is to be treated as falsifying the account or document.

Principles of Sentencing

[17] The Court of Appeal decision of **Desmond Baptiste et al**¹ is instructive in so far as it adopts and endorses the cardinal principles of sentencing which are retribution, deterrence, prevention and rehabilitation. It is therefore submitted that the said principles be considered in determining the appropriate sentence to be meted out.

[18] According to Lawton LJ in **R v Sargeant**²:

“Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.”

¹ Criminal Appeal No. 8

² 60 Cr. App. R. 74

[19] In applying the principles of sentencing to the facts and circumstances of this case it was the submission of the Crown that the following are most relevant:

Retribution – the Court in sentencing Ms. Jillian Fahie must by the sentence imposed reflect its abhorrence and by extension society's for these types of offences. The BVI Airport Authority is a government owned operation. Offences of this nature have severe financial repercussions for business owners and the effect is often times crippling to the entity if it persists undetected. Offences of this nature also tend to erode the confidence of the public in the government owned entity.

Deterrence – This principle should feature in both the general and specific sense. That is, to act as a general deterrent to potential offenders but more so as a deterrent to the defendant. In **R v Elvin Chitan³ Aziz J** stated at page 7, "*at the end of the day, a sentencing court must not only deter the offender from any further criminal activity, but ensure that they and others tending to lean towards a life of crime can take two steps back and continue onto the path of an honest and productive life in society.*"

[20] Counsel for the defendant Mrs. Gordon drew the Court's attention to the *dicta* of Sir Dennis Byron in the case of **Desmond Baptiste vs. The Queen⁴** where he said at page 2, "a sentencer should be mindful of the general undesirability of imprisoning a young offender for the first time. Such offences, the Court should take care to consider the prospect of rehabilitation and accordingly give increased weight to such prospect of rehabilitation and accordingly give increased weight to such prospect; when imprisonment is required, the duration of incarceration should also take such factors into account." He went on to say, "in the same vein in cases where the offender is a mature individual with no apparent propensity for commission of the offence, the sentence should also take this circumstance into account in weighing the desirability and duration of a prison sentence".

[21] Counsel for the defendant has commended this dictum to the Court and has urged the Court to note that this defendant was a mature individual with no apparent propensity for the commission of offences. Counsel also urged the Court to impose a non-custodial sentence.

³ GDAHCR2016/0037

⁴ *supra*

Character Witnesses and particular circumstances of the defendant

- [22] The defence called three (3) character witnesses.
- [23] The first witness was Ms. Patsy Lake who had known the defendant all her life and was well acquainted with the defendant and her family. She indicated that she was very surprised and concerned about the defendant's dishonest conduct and undertook to offer the defendant employment.
- [24] Ms. Smith identified herself as the defendant's Godmother having known the defendant from birth. She stated that she did not condone the conduct of the defendant and said that she did not know the defendant to be a dishonest person and that her offending had come as a shock. She also said that she would "take Jillian and have her closer to her". Significantly she noted that the defendant felt insecure as she had not progressed in life as she felt she should have and that she compared her life to that of her siblings.
- [25] The final character witness was Mr. Chalwell, Pastor of the Church of God of Prophecy in East End. He indicated that he had known the defendant all of her life and that he did not condone her offending. He indicated that he knew the defendant to be a reserved and quiet individual who 'did not speak much' and "who one had to get close to get anything from her". He also indicated that he had spoken to her about her offending and that he had also counseled her for her feelings of inadequacy and depression. He asked the Court to temper justice with mercy.
- [26] Having heard from the character witnesses it has become clear to the Court that the defendant at the time of the offending was unhappy and depressed. All of the witnesses indicated that the defendant is normally a quiet individual and that the offending was out of character for her.
- [27] It is also significant to note that the offending occurred when the defendant was in her middle years having previously lived a life free of crime.

- [28] All of the character witnesses alluded to the defendant's feelings of inadequacy and her not 'measuring up' to the successes of her siblings. These feelings can manifest themselves in many different ways and it appears that in the case of the defendant it manifested itself in thievery.
- [29] The defendant herself took to the stand and expressed her remorse for her conduct. She expressed feelings of shame and contrition and publicly apologized to her former employers for her transgressions.
- [30] The defendant also indicated that she had feelings of inadequacy which stemmed for things that had been said to her by her own family members resulting in feelings of low self-esteem and depression. She expressed considerable remorse recognizing the shame and distress she had caused her family.
- [31] She indicated that all the funds stolen had been paid back to the BVI Airport Authority accompanied by a letter of apology to the Managing Director, Mr. Fraser.

Aggravating and Mitigating Factors

- [32] Senior Crown Counsel set out the following **Aggravating Factors** which she felt applied as being:
- 1) Breach of trust
 - 2) Impact on the defendant's employer
 - 3) The theft occurred over a period of time

Mitigating Factors were set out as:

- 1) The defendant's early guilty plea
- 2) The defendant co-operated with the Police

Counsel for the defendant set out the **Aggravating Factors** as:

- 1) The offending was carried out over a period of time (four months)
- 2) There was a degree of planning
- 3) Breach of trust

And the **Mitigating Factors** as being:

- 1) No previous convictions
- 2) Remorse
- 3) Full restitution made to the BVI Airport Authority
- 4) Early guilty plea
- 5) Has a minor child

[33] The Court agreed mostly with both Counsel and found the **Aggravating Factors** in relation to the **offence** as being:

- 1) There was a degree of planning;
- 2) The offence was committed over a four month period; and
- 3) The commission of the offence resulted in a breach of trust and thus increased the seriousness of the offending.

The **Mitigating Factors** in relation to the **offence** were summarized as the following:

- 1) The full restitution has been made to the Complainant.

[34] The Court found no aggravating factors relating to the **defendant** however the mitigating factors in relation to the defendant can be summarized as thus:

- 1) The defendant is the mother to a young child and she is a single mother;
- 2) The defendant admitted her wrong doing as soon as she was approached by the police and did not waste the police time;
- 3) The defendant entered an early guilty plea;
- 4) The defendant made full restitution to the complainant; and
- 5) The defendant is a first time offender.

The Authorities

[35] The Crown was extremely helpful in submitting authorities for consideration by the Court. In **The Queen v. Threacha Berry (8th May 2017, BVI)**. The defendant was charged with the offences of

Theft and False Accounting in the sum of US \$12,965.63. She entered a plea of guilty on 24th April 2017 and was remanded into custody until sentencing on 8th May 2017. At the time of the offending the defendant was employed at the Water & Sewerage Department with the Government of the Virgin Islands, stationed in Virgin Gorda as a cashier. The defendant executed her dishonesty by failing to issue an official Government receipt to customers when they paid their water bill. Similarly, the customer's payments were never entered into the system. As in the case at bar, an audit was conducted where it was discovered that the defendant had stolen the above mentioned sum and falsified documents to aid in her cover up of the said sums. The defendant was sentenced to:

- (a) 1 ½ years' imprisonment for each count of theft suspended for two (2) years;
- (b) 8 months imprisonment on each count of false accounting suspended for one (1) year to run concurrently;
- (c) The defendant was also required to enter into a Bond in the amount of \$5,000.00 USD and;
- (d) compensation order in the amount of \$12,965.63 USD to be paid with six (6) months from date of sentence in default one (1) year.

[36] **The Queen v. Andress Johnson (No. 23 of 2013).** The defendant was charged with forty-nine counts (49) of Theft totaling in the amount of US \$64,777.15. She pleaded guilty to these offences on 8th May 2015 and was sentenced to two (2) years imprisonment on each count to run concurrently. She was also ordered to pay compensation in the amount of US \$60,000.00 upon release or in default thereof spend six (6) months in prison.

[37] **The Queen v Lyra George (No. 17 of 2007),** the defendant pleaded guilty to twelve (12) counts of Theft and eight (8) counts of False Accounting. Over a period of time the defendant stole US \$296,262.04 from the Bank of Nova Scotia where she was employed as an Accounts Officer. The defendant pleaded guilty at the first available opportunity and was sentenced to three (3) years imprisonment for Theft and two (2) years' imprisonment for False Accounting to run concurrently. She was ordered to compensate the Bank for the monies that were stolen.

[38] **The Queen v. Monique Farrington (No. 19 of 2002)** this defendant had nine (9) counts against her, three (3) of which were for Theft. She received a verdict of guilty with respect to the three (3)

counts of Theft and was placed on probation for three (3) years and was ordered to see Dr. Rhymer Todman, who was to give a report to the Court every three (3) months. She was ordered to pay back Chase Manhattan Bank in the amount of US \$8,000.00. This case can be distinguished from the case at bar as she was found guilty after trial.

- [39] Counsel for the defendant drew the Court's attention to the case of **The Queen vs. Monalyssa George**⁵ where the issue of restorative justice was discussed.

The Sentence

- [40] In arriving at an appropriate sentence the Court has regard to **Section 4 of the 2005 Criminal Justice (Alternative Sentencing) Act of the British Virgin Islands** which states that, "*the Court in determining sentence shall consider the following relevant matters such as the offence circumstances or facts; other offences; any course of conduct with similar offence; personal circumstances of victim; injury, loss or damage; remorse shown; reparation or restitution, guilty plea; co-operation with investigations; need to protect community; deterrence, adequate punishment; the character, antecedents, age, means and physical or mental condition of the defendant etc.*"
- [41] In consulting the draft **Eastern Caribbean Supreme Court Sentencing Guidelines**, the Court must firstly have regard to the seriousness of the offence and its consequence by reason of the harm caused. Now, one may feel that because the money was stolen from a government entity that the harm is less. The Court does not agree with this assessment as the offending affects the confidence of the general public in the ability of the airport authority to adequately secure its funds.
- [42] Having said this, the guidelines place this level of offending into the low level category four (4) tier of offending.

⁵ SLUCHRD2013/1682

- [43] The second stage that the Court must have regarded is to consider and assess the seriousness by examining the culpability of the offender⁶. This type of unsophisticated stealing with minimum level planning brings the offending into the lesser level tier four (4). The Court acknowledges that the offending took place over a period of four (4) months.
- [44] The Court has taken into account her early guilty pleas and has applied her full one third (1/3) discount.
- [45] The Court has also weighed the Mitigating and Aggravating Factors and has found that the aggravating factors are outweighed by the mitigating factors.
- [46] The Court is also cognizant of this defendant's particular circumstances and the fact that most of the character witnesses have committed to "take her under their wings" and to provide counseling and guidance in order to build her self-esteem and confidence.
- [47] The Court is in agreement with Defence Counsel that a non-custodial sentence is in order and has decided to temper justice with mercy.
- [48] Having viewed the authorities, the submissions from Counsel and weighed the particular circumstances of this defendant, the Court sentences the defendant to one and half (1 ½) years' imprisonment for each count of Theft suspended for two (2) years; one and a half (1 ½) years' imprisonment on each count of False Accounting suspended for one (1) year.
- [49] All sentences are to run concurrently.

**Ann-Marie Smith
High Court Judge**

By the Court

Registrar

⁶ Draft Sentencing Guidelines for the Eastern Caribbean Supreme Court – Theft