

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIMCRAP2018/0003

BETWEEN:

BRIAN PENN

Appellant

and

THE COMMISSIONER OF POLICE

Respondent

Before:

The Hon. Mde. Vicki Ann Ellis
The Hon. Mde. Esco L. Henry
The Hon. Mr. Dexter Theodore KC

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Israel Bruce for the Appellant
Ms. Tiffany R. Scatliffe, Director of Public Prosecutions for the Respondent

2024: May 24
2025: September 16.

Criminal appeal – Appeal against conviction and sentence – Failure of employee to pay contributions contrary to regulation 10 (1) of the Social Security (Contributions) Regulations – Section 218(1)(b) of the Criminal Code of the Virgin Islands – Evasion of liability by deception - No case submission – Whether learned magistrate erred in dismissing no case submission – Irregularity in drafting charge - Sections 180 and 181 of the Magistrate’s Code of Procedure - Amendment of charge on appeal – Resentencing on appeal - Principles of sentencing

The appellant and his wife were, at the material times, the directors of a private security company registered in the British Virgin Islands under the name ‘Vanguard Security Services and Supplies Limited’ (“Vanguard” or “the Company”) which employed a number of persons including Shatroop Tamaisar, Lawrence Syfox, Michael Brower, Ezron Roberts and Frederick Daly (collectively “the employees”) as security guards.

The Commissioner of Police (“COP”) alleged that Vanguard through its directors breached its statutory duty to pay to the Social Security Board (“SSB”) the employee and employer contributions attributable to the employees and through deception evaded liability to make those payments. Arising from those complaints, the COP charged the appellant and his wife with breach of regulation 10(1) of the Social Security (Contributions) Regulations (“the Regulations”) and Evasion of Liability by Deception contrary to section 218(1)(b) of the Criminal Code of the Virgin Islands.

At trial before the learned magistrate, employees gave evidence that Vanguard deducted from their pay, the employee contributions that were payable to the SSB on their behalf and this was reflected in their pay slips. They however later discovered that some of the contributions deducted from their pay had not been paid to SSB and they were accordingly denied social security benefits.

The Contributions Officer at the SSB also gave evidence that upon conducting inquiries into the status of contributions by Vanguard, she discovered that Vanguard made no payments in respect of Exron Roberts or Frederick Daly for the period July 2010 to July 2011; for Mr. Daly between June 2010 and June 2011; for Michael Brower for the period June 2010 to January 2011 or for Shatroop Tamaisar between June 2010 and December 2011. The appellant, though admitting that he did not transmit Contribution Remittance Forms to the SSB in 2010 and 2011 in respect of Vanguard employees, asserted that he had entered into an agreement with SSB to pay the outstanding contributions subsequently. The learned magistrate found that the appellant failed to comply with the statutory duty to pay social security contributions and submit the remittance forms within the timelines prescribed by law, with respect to Messrs. Tamaisar, Syfox and Brower for the period June 2010 to December 2011; for Mr. Daly between June 2010 and June 2011 and in relation to Mr. Roberts respectively for the periods July 2010 to July 2011 and June 2010 to December 2011.

As to the charges of Evasion of Liability by Deception, the learned magistrate found that the Crown had established the essential elements of the offence by proving that the appellant intended to make a permanent default in his existing liability to pay part or all - contributions on behalf of the employees and that he dishonestly induced the director of the SSB to wait for payment of those contributions.

On 11th July 2018, the appellant was fined \$100.00 in respect of each conviction of failure to pay contributions; a total of \$8,400.00. In relation to each count of Evasion of Liability by Deception, a fine of \$500.00 was imposed, amounting to \$33,500.00. He was given until 11th July 2019 to pay the fines.

Being dissatisfied with the convictions and sentences, the appellant filed a notice of appeal on 24th December 2018 against his convictions and sentences. The issues for the Court's determination are: 1.) whether the learned magistrate erred by rejecting the no case submission due to a misdirection as to whether a) a criminal offence is created by regulation 10(1) in the absence of a penalty clause; and/or b) the prosecution had not established the *mens rea* of the offence of Evasion of Liability by Deception. The second issue is whether

the learned magistrate erred by imposing sentences that were manifestly excessive and unduly severe.

Held: dismissing the appellant's appeal against his convictions and affirming the appellant's convictions; allowing the appeals against sentence and making the further orders at paragraph 102 of the judgment, that:

1. A no case submission may be advanced and sustained on one of two limbs, namely that: 1) there is no evidence to prove that the accused committed the offence with which he is charged; or 2) the evidence presented by the Crown is of such a tenuous nature, is manifestly unreliable or has been so badly discredited that taken at its highest, no reasonable trier of the facts could properly convict on such evidence. Thus, when reviewing an appeal against conviction on the ground that a magistrate erred in dismissing a no case submission, an appellate court's function is to determine whether there was in fact a case to answer and in doing so, the appellate court will assess whether the magistrate's evaluation was correct regarding the adequacy of the evidence adduced by the Crown.

R v Galbraith [1981] 2 ALL ER 1060 applied; **Director of Public Prosecutions v Varlack** [2008] UKPC 56 applied; **Edwin Gomez v The Queen** ANUHCRA2014/0012 (delivered 17th August 2022, unreported) followed.

2. Regulation 10(1) creates the offence of failure to pay the employer and employee contributions to the SSB and the penalty for this infraction is prescribed by section 35 of the Ordinance. Consequently, a charge for that offence must necessarily include a reference to both provisions. While an omission of either reference constitutes an error or irregularity in drafting, it is not necessarily fatal as not every irregularity in proceedings for a criminal offence will invalidate the proceedings or amount to a miscarriage of justice that would be fatal to a conviction. An appellate court would assess all the circumstances to determine whether such error or defect constitutes a miscarriage of justice sufficient to nullify the proceedings or conviction. If the defect is merely technical and the nature of the charge is clear, an amendment may be granted by the appellate court.

Section 181 of the **Magistrate's Code of Procedure Act** Cap. 44 of the Laws of the British Virgin Islands applied; **DPP v Stewart** (1982) 35 WIR 296, PC applied.

3. In this case, the particulars of offence as contained in each charge against the appellant of failure to pay the employer and employee contributions comports with the language in regulation 10(1) and section 35 of the Ordinance and give full and ample notice to the appellant of the facts alleged against him. The appellant's contention that the learned magistrate erred by finding that an offence is created by regulation 10(1) is not borne out by a proper construction of the overarching legislative framework and the statutory context within which regulation 10(1) is to be construed. For the foregoing reasons, the no case submission made by the appellant with regard to the complaints of failure to pay contributions under regulation 10(1) would fail and the learned magistrate was correct to dismiss it.

Further, although the charges against the appellant under regulation 10(1) of the Regulations were defective in that they did not include reference to section 35 of the Ordinance – the penalty provision- this is a technical drafting error, not going to the substance of the particulars of the offences, is not fatal and may be cured by amendment. In the circumstances of this case and in light of the obvious technical defect in the charges due to the absence of a reference to section 35 of the Ordinance, it is appropriate to invoke section 180 of the Magistrate's Code of Procedure Act to cure the patent technical defect by amending the charges. The statement of offences in the eighty-four complaints (for failure to pay contributions) are amended by inserting after the words 'contrary to', the words 'Section 35 of the Social Security Ordinance and'.

Section 180 of the **Magistrate's Code of Procedure Act** Cap. 44 of the Laws of the British Virgin Islands applied.

4. To secure the appellant's conviction for the offence of Evasion of Liability by Deception, the Crown needed to prove the four necessary ingredients of the offence namely: 1.) the fact that the appellant was a director of Vanguard at the time of commission of the offence; 2. a) that at the relevant time, the appellant intended to make permanent default; b) in part or all of the payment of a specific amount of money for social security contributions to the SSB in respect of a specific Vanguard employee; 3. the respective contribution was payable in respect of a specific period; and 4.) the appellant dishonestly induced the director of SSB to wait for payment by dishonestly pretending that he would submit the remittance form to the SSB with payment. In this case, there was enough evidence on which the learned magistrate as the trier of facts could reasonably find that the Crown had laid out a prima facie case against the appellant at the end of its case; and had established the charges against the appellant of evading liability by deception beyond a reasonable doubt at the close of the trial -. There was therefore a case for him to answer on the sixty-seven counts of Evasion of Liability by Deception under section 218(1)(b) of the Criminal Code. The learned magistrate was therefore entitled to dismiss this aspect of the no case submission and to convict the appellant of those charges. This ground of appeal accordingly fails.

Section 218(1)(b) of the **Criminal Code** Cap. 266 of the Laws of the Virgin Islands applied.

5. An appellate court will not interfere with a sentence passed by a lower court unless satisfied that a) the sentence is not justified in law; b) it was passed on the wrong factual basis; c) the sentencer improperly took into account any irrelevant matter; or d) the sentence is manifestly excessive or wrong in principle. In this case, the learned magistrate erred in principle in sentencing the appellant to a fine of one hundred dollars for each of the eighty-four counts of failure to pay the contributions contrary to regulation 10(1), by invoking the incorrect penalty provision - and by failing to provide reasons for arriving at the decision to impose the highest permissible sentences in respect of the offences. The appellant therefore must be resentenced by the appellate court. In crafting a sentence, the Court must remain

mindful of the four aims of sentencing, namely deterrence, retribution, punishment and rehabilitation and give effect to settled principles of law having regard to the facts of the case under consideration. The Court must also consider the sentence range, identify an appropriate starting point, the relevant mitigating and aggravating factors and any other relevant circumstances. If applicable, credit must be granted for time spent on remand.

Section 19(10)(a) of the **Interpretation Act** Cap. 136 of the Laws of the Virgin Islands applied; **Director of Public Prosecutions v Shaunlee Fahie** BVIHCRA2008/003 (delivered 11th January 2010, unreported) followed; **Desmond Baptiste v R** Saint Vincent and the Grenadines Crim Appeal No. 8 of 2003 (delivered 6th December 2004, unreported) followed.

6. In conducting the resentencing exercise and bearing in mind the principles of sentencing, the Court will impose a fine of \$75.00 in respect of each of the eighty-four counts of failure to pay contributions under regulation 10(1) of the Regulations, for a total of \$6300.00. With respect to the Evasion of Liability by Deception charges, a fine of \$350.00 for each of the sixty-seven counts is imposed, making a total of \$23,450.00.
7. Section 24(1)(c) of the **Criminal Code** empowers the Court to include as part of a sentence of a fine, an order that in default of payment of the fine, the offender shall suffer imprisonment for a term not exceeding the maximum term in section 25 which prescribes a sliding scale against which the default imprisonment term is established. Where the sum of money adjudged to be paid exceeds \$2000.00, the term of imprisonment in default is not to exceed six months. In all the circumstances of this case, the default term of imprisonment ought to be fixed at six months in light of the large number of offences for which the appellant was convicted. Accordingly, it is also ordered that in default of payment of the fines imposed for breach of regulation 10(1) and section 218(1)(b) of the **Criminal Code**, the appellant shall serve a term of imprisonment of six months.

Section 24(1)(c) of the **Criminal Code** Cap. 266 of the Laws of the Virgin Islands applied.

JUDGMENT

Introduction

- [1] **HENRY JA:** The appellant Mr. Brian Penn was convicted by the learned magistrate on 5th July 2018 of eighty-four counts of failure as a director of 'Vanguard Security Services and Supplies Limited' ("Vanguard" or "the Company") to make payments to the Social Security Board ("SSB") of the employees' contributions in respect of a number of employees, employed by Vanguard, contrary to regulation 10(1) of the

Social Security (Contributions) Regulations (or “the Regulations”)¹. He was also charged and convicted of sixty-seven counts of Evasion of Liability by Deception under section 218 (1) (b) of the **Criminal Code**². On 11th July 2018, Mr. Penn was fined \$100.00 in respect of each conviction of failure to pay contribution, a total of \$8,400.00. In relation to each count of Evasion of Liability by Deception, a fine of \$500.00 was imposed, amounting to \$33,500.00. He was given until 11th July 2019 to pay the fines.³

- [2] Being dissatisfied with the conviction and sentence, Mr. Penn filed a notice of appeal on 24th December 2018 against his convictions and sentences.
- [3] Mr. Penn advanced two grounds of appeal. He contended that the sentence was excessive and unduly severe; and that the learned magistrate erred in law by not upholding the No Case Submission made at the end of the Crown’s case at trial.
- [4] The appellant submitted that in light of the overall circumstances of the case the sentence was excessive and unduly severe. It was submitted that among other factors, the learned magistrate ought to have considered the fact that the SSB was pursuing or entitled to pursue him in civil proceedings under section 37 of the **Social Security Ordinance (or “the Ordinance”)** to recover the contributions owed; he was interdicted from work for years before his trial was completed; he was guaranteed to lose his substantive job with the government on being found criminally liable and he honestly held the view that the SSB held a credit on the Company’s account and was therefore indebted to the Company.
- [5] It was submitted further that regulation 10(1) under which the appellant was convicted, does not contain a penalty for the breach of the provision. Therefore, the learned magistrate erred by rejecting the No Case Submission that no offence was created by that regulation and the related charges were therefore bad in law.

¹ Cap. 266 of the Laws of the Virgin Islands.

² Act No. 1 of 1997.

³ See Sentencing remarks of learned Magistrate at Hearing Bundle, pg. 737.

Further, it was argued that the prosecution failed to establish the requisite *mens rea* of the offence of Evasion of Liability by Deception, therefore the convictions were unsafe.

- [6] On behalf of the Crown, the learned Director of Public Prosecutions (“DPP”) Ms. Tiffany Scatliffe conceded that the learned magistrate did not indicate what mitigating factors were considered in arriving at the sentences and no full reasons supported the sentencing decision. In those circumstances, she erred in principle and the Court of Appeal must decide whether the sentence was excessive and if so, re-sentence the appellant.
- [7] The respondent acknowledged that regulation 10(1) does not contain a penalty clause. It was submitted however that the penalty provision in section 35 of the principal Ordinance would be applicable in such a situation. As to whether the learned magistrate erred in dismissing the no case submission, the respondent argued that there was adequate evidence on which the learned magistrate could find that the appellant had committed the offences with which he was charged.

Issues

- [8] Two issues arise for consideration. The first is whether the learned magistrate erred by rejecting the no case submission due to a misdirection as to whether a) a criminal offence is created by regulation 10(1) in the absence of a penalty clause; and/or b) the prosecution had not established the *mens rea* of the offence of Evasion of Liability by Deception. The second issue is whether the learned magistrate erred by imposing sentences that were manifestly excessive and unduly severe.

Background

- [9] The factual matrix is not complicated. At the material times, the appellant was employed as a member of the Royal Virgin Islands Police Force. He and his wife Harinder Stevens-Penn were directors of Vanguard. At the relevant times Vanguard employed a number of persons including Shatroop Tamaisar, Lawrence Syfox,

Michael Brower, Ezron Roberts and Frederick Daly (“the employees”) as security guards.

- [10] The Commissioner of Police (“COP”) alleged that Vangard through its directors breached its statutory duty to pay to the SSB the employee and employer contributions attributable to the employees; engaged in false accounting practices; failed to keep proper records, record the contributions or send returns to the SSB through the monthly submission of properly completed remittance forms; and did all of this for the purpose of dishonestly evading its liability to make those payments to the SSB. In addition, the Crown’s case was that Vangard failed to issue the requisite certificates to the employees at the end of the year and/or on termination of their employment.
- [11] Arising from those complaints, the COP charged the appellant and his wife with breach of regulation 10(1) of **the Regulations** and Evasion of Liability by Deception contrary to section 218(1)(b) of the **Criminal Code**. At trial before the learned magistrate, some of the employees testified that Vangard deducted from their pay, the employee contributions that were payable to the SSB on their behalf and this was reflected in their pay slips. However, when the employees attempted to make claims from the SSB for social security benefits such as sick leave pay, they discovered that some of the contributions deducted from their pay by Vangard’s directors had not been paid to the SSB nor were the employer’s contributions paid as stipulated by law. The employees were therefore denied their social security benefits. During the trial, the Crown exhibited payroll sheets from Vangard in respect of employees Brower, Syfox and Tamaisar which showed that the social security deductions were made from their wages.
- [12] The Contributions Supervisor at the SSB at the relevant times was Ms. Lisa McIntosh Bobb. By the time of the trial, she had served in that capacity for twelve years. She testified that she had responsibility for ensuring that social security contributions are paid in accordance with the law, that proper entries of such payments are made in the records kept at the SSB and for making inquiries as to

the status of contributions. She explained that by law each employer must contribute 4.5% while the employees are required to contribute 4% of their insurable earnings in monthly payments to the SSB.

[13] Employers are charged with making the necessary deductions of the employees' contributions from their earnings and transmitting the funds to the SSB within fourteen days after the end of the month in which the earnings were made. Payments are credited to the employer's account at the SSB and are verifiable from comparison between the remittance form and the employer's account. The employers are also required to complete and submit a monthly remittance form to the SSB detailing the payments by reference to the employees. The contributions are collected and on application by eligible employees are expended by the SSB to pay employees' illness, maternity and other benefits.

[14] Ms. McIntosh Bobb testified that Vangard was registered with the SSB on 9th August 2001. She had occasion to conduct inquiries into the status of contributions by Vangard. She discovered that Vangard made no payments in respect of Exron Roberts or Frederick Daly for the period July 2010 to July 2011; for Mr. Daly between June 2010 and June 2011; for Michael Brower for the period June 2010 to January 2011 or for Shatroop Tamaisar between June 2010 and December 2011. She explained that the Inspectorate Department deals with people who default in paying the contributions.

[15] The appellant admitted that he did not transmit Contribution Remittance Forms to the SSB in 2010 and 2011 in respect of Vangard employees. He attributed this failure to a computer malfunction that prevented him from accessing the requisite information. He accepted that contributions were outstanding for that period. He explained that Vangard started using new software in 2011 and was able to generate the necessary information to populate the remittance forms from that time. However, he asserted that he had entered into an agreement with SSB to pay the outstanding contributions subsequently. He averred that the employee who was familiar with the software resigned in November 2011 and did not leave the

password for the programme and he was therefore unable to locate it. He stated that in any event he was not trained in the use of the software. He explained that he reverted to using Excel spreadsheet at the turn of 2011 and began preparing the payrolls himself.

[16] The appellant testified that Vanguard made an arrangement with the SSB at the beginning of 2010 and again in or about November/December 2010 whereby monies payable to Vanguard under certain contracts with the government were to be paid by the Ministry of Finance directly to the SSB to cover the contributions on behalf of the employees. This was done he said, because Vanguard owed outstanding contributions to the SSB. He testified that in order to obtain a certificate of good standing from the SSB he had to make an arrangement whereby sums due to Vanguard under a contract with the government were to be paid directly to the SSB. Under the first arrangement the government was to deduct a total of \$9000.00 from the contract sums for this purpose and did so over the three-month period of the contract, paying a total of \$27,000.00 to the SSB which he said covered all outstanding sums. The second arrangement was also intended to operate in a similar manner. Ms. McIntosh Bobb denied knowledge of any such arrangements between the SSB and the appellant to make payments to SSB outside of the statutory scheme.

[17] The appellant averred further that the SSB was holding a credit of \$5000.00 for Vanguard that could be applied to the outstanding contributions for 2010 and 2011, if Vanguard supplied the SSB with the corresponding remittance forms. He accepted that the remittance forms had not been submitted. He admitted that the SSB applied the contract monies received from the government to the employee contributions for 2012 instead of towards the sums due and owing from earlier periods.

[18] It was not disputed that no remittance forms had been submitted for the 2010 or 2011 periods. The learned magistrate ruled that even if a credit was available to Vanguard at the SSB, those funds could not be applied to the outstanding 2010 or 2011 contributions in the absence of the remittance forms which would indicate the

names of the employees against which the contributions were being paid and the relevant periods. The learned magistrate found that the appellant failed to comply with the statutory duty to pay social security contributions and submit the remittance forms within the timelines prescribed by law, with respect to Messrs. Tamaisar, Syfox and Brower for the period June 2010 to December 2011; for Mr. Daly between June 2010 and June 2011 and in relation to Mr. Roberts respectively for the periods July 2010 to July 2011 and June 2010 to December 2011⁴.

[19] As to the charges of Evasion of Liability by Deception, the learned magistrate found that the Crown had established the essential elements of the offence by proving that the appellant intended to make a permanent default in his existing liability to pay part or all contributions on behalf of the employees and that he dishonestly induced the Director of the SSB to wait for payment of those contributions. She took into account that by 2nd March 2017, when the appellant gave his evidence in court, six to seven years had elapsed from when the defaults in payment occurred. Accordingly, she ruled that the charges were made out in relation to Messrs. Tamaisar and Syfox for the periods June 2010 to December 2010 and January 2011 to December 2011; for the period June 2010 to February 2011 with respect to Mr. Brower; for the period July 2010 to August 2012 with respect to Mr. Roberts and from June 2010 to June 2011 in relation to Mr. Daly.⁵

[20] The learned magistrate found that any payment held on credit for Vanguard by the SSB would not be attributable specifically to the 2010-2011 payment year but rather for any remittance forms produced by Vanguard. Therefore, the appellant's actions were dishonest, in that although he made deductions from the employees' insurable earnings for the employees' share of contributions, he failed to submit the contributions and the corresponding remittance forms to the SSB and compounded this failure by not taking steps to rectify the situation by producing remittance forms for the relevant periods. The magistrate held that the appellant thereby induced the Director of the SSB to wait for the payments over an extended period. She

⁴ See paras. 33 and 37 of the Decision.

⁵ Para. 39 of the Decision.

concluded that the reasonable inference is that he intended to permanently and dishonestly deprive the SSB of those contributions.

Appellant's Submissions
Issue 1- No Case Submission

- [21] The appellant took two main points in support of his contention that the learned magistrate erred in law by not upholding the no case submission. He contended that regulation 10 (1) while specifying action that must be taken by an employer, does not specify a penalty for its violation. He argued that it is a trite principle of law that in the absence of a penal sanction, an offence is not created by a statutory provision. It was submitted that the offence of failing to make payments of contributions is created by section 35 of the **Ordinance** which also contains the penalty clause. It was submitted further that in arriving at her decision the learned magistrate made inconsistent findings that on the one hand **the Regulations** do not contain a penalty section and the only offence that the court can identify is the failure to make payments as encapsulated under section 35 of **the Ordinance** and on the other hand, found him guilty under regulation 10(1). He argued further that the Crown cannot seek to apply the penalty prescribed by section 35 of **the Ordinance** or any part thereof as this would be gravely prejudicial to him.
- [22] Noting that section 44 of **the Ordinance** empowers the minister to create offences by regulation, the appellant submitted that the learned magistrate aptly addressed this provision when considering the no case submission and held correctly that it was not invoked by the minister since he did not include a penalty for violation of regulation 10(1). It was submitted that by disregarding the import of that provision and her own deductive reasoning, the learned magistrate erred by not applying such reasoning in arriving at her decision to dismiss the no case submission.
- [23] The second argument advanced by the appellant under this ground of appeal is that the Crown did not establish the *mens rea* component of the offence of Evasion of Liability by Deception. It was submitted that the Crown provided no or no sufficient evidence to show that the appellant dishonestly induced the director of the SSB by

deception to wait for payments by falsely pretending that he would submit the remittance forms with payment of the contributions. It was argued that although the Crown conceded that a delay in making payment is not necessarily a permanent default, it wrongly invited the court to find that such permanent default and dishonest inducement can be inferred from the fact that the payments were not made. The appellant argued that by advancing this argument the Crown had effectively conceded that it had failed to prove that he had the requisite 'intention to make permanent default in whole or in part' of the payment, to the standard required to satisfy section 218(1) (b) of the **Criminal Code**.

[24] The appellant submitted further that in view of the Crown's evidence that he did not submit certain remittance forms and made no effort to rectify others that he claimed were rejected, and made no payments with respect to those missing details, this is supportive of his argument that the Crown provided no evidence to show that he took steps to induce the director of the SSB to wait for payments.

[25] It was submitted that when the Crown closed its case no evidence had been led to support a finding that the director of the SSB had been dishonestly induced by the appellant. Furthermore, the Crown adduced no evidence as to what conduct of his amounted to dishonest inducement. The appellant argued that while the learned magistrate demonstrated an appreciation that it was necessary for deception to be established, she misapplied the legal principles and as a result erred in dismissing the no case submission.

Respondent's Submissions

[26] On the Crown's behalf, the learned DPP argued that the learned magistrate was correct to dismiss the no case submission and her reasons for doing so cannot be faulted. With respect to whether regulation 10(1) creates an offence, she submitted that the court is required to examine **the Regulations** and **the Ordinance** together

and not take an isolated approach. Pointing to section 35 of **the Ordinance**, the learned DPP stated that it demonstrates that the legislators intended to ensure that contributions are paid by employees and this was accepted by the learned Magistrate.

[27] Citing **Malcolm Maduro v the Queen**⁶, the learned DPP submitted that there was evidence before the court that supports a conviction or which a reasonable mind could rely on to make a finding of guilt for the offences charged under regulation 10(1) and section 218(1)(b) of the **Criminal Code**. As to the former, it was submitted that regulation 10(1) creates a strict liability offence and the Crown led evidence that the appellant failed to pay the employees' contributions within fourteen days of the end of the month as charged.

[28] With respect to the latter, it was posited that the appellant provided no supporting documentation to buttress his testimony that he had an agreement with the government and SSB whereby sums owed to Vanguard by the government would be paid by the Ministry of Finance to SSB by monthly instalments to defray the outstanding contribution payments to SSB. It was submitted that the Crown discharged the onus of proving at trial that the appellant had no intention to pay all or part of the existing liability (the contributions) to the SSB and he dishonestly induced the SSB to wait for payment. It was argued that the appellant failed to pay the employees' contributions for periods of over one year and up to eighteen months in some instances.

[29] It was submitted further that the appellant's failure to give the employees pay slips on those occasions when contributions were not paid, coupled with the fact that contributions were deducted from the employees' insured earnings at those times and not paid to the SSB evidenced his dishonesty. In addition, it is relevant and probative that the appellant acknowledged that Vanguard owed outstanding payments, he admitted making arrangements with persons at the SSB to satisfy

⁶ BVIHCRA2007/004 (delivered 19th December 2008, unreported).

those debts and failed to supply vital information by submitting the requisite remittance forms or rectifying others that he claimed were rejected. Taken together, those circumstances provided compelling evidence of dishonesty and material from which the learned magistrate was entitled to draw the inference that the appellant dishonesty induced the Director of SSB to wait for payments and of his intention to permanently deprive the Director of those payments.

- [30] The learned DPP submitted that the learned magistrate considered the applicable legal principles set out in **R v Galbraith**⁷, **Director of Public Prosecutions (British Virgin Islands) v Varlack**⁸ and **R v Cook**⁹ and properly applied them to the evidence. There is therefore no basis on which this Court may interfere with the learned magistrate's dismissal of the no case submission.

Discussion

- [31] The learned magistrate's ruling on the no case submission is challenged on two bases. The first relates to the construction of regulation 10(1) within the overall legislative framework and turns on a purely legal argument. The second is from an evidentiary perspective and involves mixed law and factual contentions.
- [32] The celebrated case of **R v Galbraith** outlines the legal principles which guide a judicial officer when he or she is invited to rule on a no case submission. A magistrate may, on application by a defendant at the end of the Crown's case in a criminal trial conclude that there is no case to answer and discharge the defendant with respect to the particular charge. The submission may be advanced and sustained on one of two limbs, namely that: 1) there is no evidence to prove that the accused committed the offence with which he is charged; or 2) the evidence presented by the Crown is of such a tenuous nature, is manifestly unreliable or has been so badly discredited that taken at its highest, no reasonable trier of the facts (the magistrate in this case) could properly convict on such evidence. In determining

⁷ [1981] 2 ALL ER 1060.

⁸ [2008] UKPC 56.

⁹ [1959] 2 QB 340.

a no case submission, the essential question for the magistrate is whether there is material on which a tribunal of fact could reasonably be satisfied of the defendant's guilt. If such material has been presented to the court, the magistrate has to direct that the trial proceeds and invite the defendant to present his case.

[33] Where however, the evidence adduced by the Crown is such that its strength or weakness depends on the view to be taken of a witness's reliability, or for some reason involves matters which are exclusively to be reserved for decision by the tribunal of fact, then the magistrate should allow the case to proceed. If there is no evidence to support a finding of guilt or the evidence is so poor by reason that it has been severely discredited through cross-examination or otherwise so that it would be unsafe to allow the case to proceed, the magistrate should uphold the no case submission.

[34] It is now settled law that when reviewing an appeal against conviction on the ground that a magistrate erred in dismissing a no case submission, an appellate court's function is to determine whether there was in fact a case to answer. In doing so, the appellate court will assess whether the magistrate's evaluation was correct regarding the adequacy of the evidence adduced by the Crown: **Director of Public Prosecutions v Varlack**. Bearing those principles in mind I turn first to consider the learned Magistrate's ruling on the no case submission specific to the failure to pay contributions. Later, I will consider the submissions in relation to the evasion of liability charges.

Regulation 10(1)

[35] In relation to regulation 10(1), the appellant's challenge to the learned magistrate's ruling on the no case submission was not directed at the evidence but rather at the formulation of the charges. The criticism centered on whether the sub-regulation creates an offence. In this regard, before the learned magistrate, on behalf of the appellant learned counsel submitted:

“... in the absence of a section provided that a breach of the Contributions Regulations creates an offence, then there is no offence created... a breach

of these Regulations even if proved does not create a criminal offence... there isn't a criminalizing ... section that makes the failure to do those things a criminal offence ... The critical thing there is that there is no provision under section 35 that says if you breach the Regulations, that is a crime...

Section 44 does not create the offence of breach of Regulations. And once Section 44 does not create that offence... the complaints alleging a breach of Regulations 22, 10 ... do not create a criminal offence. And if, of course, they do not create a criminal offence, then there is no scope for a criminal conviction to be recorded. And in those circumstances, the defendants cannot be called upon to answer the case.

... So that in the absence of any statutory amendment, there is no scope... for a finding that a breach of the Contributions Regulations was intended to create a criminal offence. Nothing in the Act so indicates. Nothing in the Regulations, as amended, so indicates. So that in those circumstances, this Court cannot... we submit, enter a conviction against these Defendants for breach of the Contributions Regulations."¹⁰

[36] Significantly, the appellant took no point that the evidence led by the Crown did not support the charge of failure to pay the employees' contributions or was tenuous or discredited. It therefore does not fit under either limb of **Galbraith**. Notwithstanding, it advances an arguable legal contention that this Court must entertain.

[37] The learned magistrate did not engage much with the submissions made on the appellant's behalf regarding regulation 10(1) and the absence of a penalty provision. She recited regulation 10(1)¹¹ which provides:

"10 (1) Within fourteen days of the end of each month an employer shall transmit to the Director together with the approved form the total amount of contributions due by the employer and his employees during the said month in compliance with the provisions of Regulation 4."

[38] Referring to all of the regulations under which the offences were charged, she then stated:

¹⁰ Volume 4 Index of Records pg. 69 lines 9 – 12; pg. 71 lines 3 – 5; pg. 72 lines 22 – 25; pg. 74 lines 9 – 11; and pg. 75 lines 3 – 4, 8 – 14, 16 – 24.

¹¹ Vol. 5 Index of Records, pg. 3.

“These Regulations are mandatory in their requirements of an employer. However, defence counsel is quite correct that these regulations do not contain a penalty section.

Counsel for the Crown directed the court to section 44 of the Principal Act that state that ‘regulations may provide for a penalty of five hundred dollars for each offence ...’. This section speaks towards the Minister’s power to make regulations. Thus, the Minister has the power to make the contravention of or a failure to comply with any regulation an offence. However, this power was not invoked as can be seen by the fact that there is no penalty section. Whether this was an oversight or not is not something this court can rectify. What the court can look at is [the] overall purpose of the legislation. ...

Thus the only offence that the Court can identify is the failure to make payments as encapsulated under section 35 of the Principal Act which provides ...”

[39] That was the extent of the learned magistrate’s engagement with this aspect of the appellant’s submission on the no case submission. She really made no formal ruling on this aspect of the submissions. However, she dismissed the no case submission in its entirety.

[40] The parties in this case recognised that the Legislature conferred power on the Minister to make regulations for among other things, prohibiting certain conduct and establishing penalties for infractions. By section 44 (1), (2) and (3) of **the Ordinance**, the Minister’s regulation making powers are circumscribed as follows:

“44. (1) The Minister may make regulations as are required by this Ordinance to be made.

(2) Such regulations may modify or affect the operation of any provision of this Ordinance as he may consider necessary or desirable generally for giving effect to the principles of this Ordinance.

(3) **Notwithstanding anything to the contrary in any other law, where no penalty is specified for any offence under this Ordinance or regulations made thereunder**, regulations may provide a penalty of one hundred dollars for each offence being a contravention of or failure to comply with any regulation, or where the offence consists of continuing any such contravention or failure after conviction thereof, one hundred dollars together with a further twenty-five dollars for each day on which it is so continued.” (Emphasis added)

[41] It is self-evident from the foregoing that the minister is empowered by subsection (3) to prescribe penalties for breach of any regulation made by him, up to a

maximum of \$100.00 for each infraction, where no penalty is prescribed for such offence under **the Ordinance** or **the Regulations**. This provision clearly authorises the minister to create offences by Regulations. However, an examination of the provisions of the Regulations made by the minister reveals that none contains a general penalty provision that is applicable to contravention of those regulations.

- [42] Importantly, section 35 of **the Ordinance** prescribes a penalty for failure of any person to pay any contribution that he is liable to pay under **the Ordinance**. However, it does not create a penalty for the offence created by regulation 10(1) of **the Regulations**. It states:

“35. (1) Any person who fails to pay at or within the time prescribed for the purpose, any contribution which he is liable under this Ordinance to pay, shall for each such failure be liable on summary conviction to a fine not exceeding one hundred dollars and in default of payment of such fine, to imprisonment for a term not exceeding one month.”

- [43] Applying the natural and ordinary meaning of the words in this provision, it is clear that the penalty prescribed by section 35 of **the Ordinance** is applicable and restricted to failure to pay contributions made payable by **the Ordinance** and does not cover failure to pay contributions under regulation 10(1). The result is that neither the Ordinance nor the Regulations have expressly prescribed a penalty for breach of regulation 10(1).

- [44] Significantly, it is immediately apparent from a comparison of Regulation 10(1) and section 35 of **the Ordinance** that the offending created by the Regulation is captured and reflected by the prohibition set out in that section. In fact, the prohibition in regulation 10(1) concerns one of the types of contributions made payable under **the Ordinance**. It is noteworthy that the conduct that is prohibited by the regulation and in respect of which the appellant faced eighty-four complaints in the Magistrate’s Court is embraced by the language of section 35 of **the Ordinance**. In addition, while not decisive of the point, it is properly accepted by both parties

that section 35 creates the penalty for those offences and should have been referred to in the complaints.

[45] From the foregoing, it is pellucid that regulation 10(1) creates the offence of failure to pay the employer and employee contributions to the SSB. The penalty for this infraction is prescribed by section 35 of **the Ordinance**. Consequently, a charge for that offence must necessarily include a reference to both provisions. Omission of either reference constitutes an error or irregularity in drafting that is not necessarily fatal.

[46] Indeed, section 181 of the **Magistrate's Code of Procedure Act**¹² provides that the Court of Appeal will not entertain or allow any objection to any proceedings in the Magistrate's Court or to any complaint, warrant or other process due to a defect or error in the proceedings or process that could have been amended by the Court, unless it appears that the defendant was thereby deceived or misled. It states:

“181. On an appeal no objection shall be taken or allowed to any proceeding in a Magistrate's Court for any defect or error which might have been amended by that Court, or to any complaint, summons, warrant, or other process to or of that Court, for any alleged defect therein in substance or in form, or for any variance between any complaint or summons and the evidence adduced in support thereof in that Court, or by reason only of the absence of the seal of the Magistrate on any such process:

Except that if any error, defect, or variance mentioned in this section appears to the Court of Appeal at the hearing of an appeal to be such that the appellant has been thereby deceived or misled, the Court of Appeal may either refer the cause back to the Magistrate with directions to re-hear and determine it, or reverse the decision under appeal, or may make any other order for disposal of the cause which justice requires.”

[47] Likewise, it is fundamental to the criminal justice process and a trite principle of law that not every irregularity in proceedings for a criminal offence will invalidate the proceedings or amount to a miscarriage of justice that would be fatal to a conviction. An appellate court would assess all the circumstances to determine whether such error or defect constitutes a miscarriage of justice sufficient to nullify the proceedings

¹² Cap. 44 of the Laws of the British Virgin Islands.

or conviction. In appropriate cases, amendment of a particular process or of a charge may be justified.

[48] The learned DPP did not seek an amendment of the charges in the Magistrate's Court or in this Court. Such a consideration did not feature in the submissions at either level. However, it seems to me that in view of the circumstances of this case that it is a relevant factor that should be considered in seeking to do justice.

[49] The learning is that an amendment to a charge in the Magistrate's Court may be made at any stage of the proceedings, even on appeal, if the Court is authorised by law to do so and if doing so would visit no prejudice or injustice on the defendant. On this, Dana S. Seetahal in her text **Commonwealth Caribbean Criminal Practice and Procedure**¹³ summarised the legal position thus:

“Overall, then, a complaint, count or an indictment may be amended in accordance with the relevant statutory provisions permitting amendment and the general principles of law. The accused person must not be prejudiced or embarrassed in his defence as a consequence of the amendment so that the later the amendment is sought, the less likely is it to be granted. If the defect is merely technical, however, and the nature of the charge is clear, an amendment may be granted even on appeal as in *DPP v Stewart* (1982) 35 WIR 296, PC.”

[50] In **DPP v Stewart**¹⁴, a case originating from Jamaica, the appellant was convicted by the resident magistrate of conspiring to contravene section 24 of the Exchange Control Act 1954 contrary to paragraph 1(1) of Part II of Schedule 5 to the Act. He was fined \$30,000.00 in default six months' imprisonment with hard labour. The particulars of the offence were:

“Herbert Stewart, between 16th and 18th May 1979 being a person in the island, conspired with other persons unknown to export foreign currency amounting to US (notes) \$13,176, US (travellers cheques) \$1410, US (money order) \$1570, Canadian notes \$67 (money order) \$241.”

¹³ Cavendish Publishing Limited, 2001 at p. 102.

¹⁴ (1982) 35 WIR 296, PC.

[51] On his appeal to the Court of Appeal, the appellant argued among other things that the count disclosed no offence known to the law, because conspiracy to export foreign notes was not an offence created by paragraph 1(1) of Part II of Schedule 5 to the Exchange Control Act. The Court of Appeal agreed with that contention holding that the count referred to the wrong part of Schedule 5. The Court granted an amendment to the indictment to include reference to the correct provision that imposed the penalty, that provision being under another Act – i.e. section 210 of the Customs Act. The count was amended to read as follows: ‘Conspiracy to contravene the Customs Act as affected by section 24 and Part III of Schedule 5 to the Exchange Control Act’.

[52] The material part of section 210 of the Jamaica Customs Act provides:

“(1) Every person who ... shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion ... of the laws and restrictions of the customs relating to the ... exportation of goods, shall for each such offence incur a penalty ...”

[53] On the defendant’s appeal to the Board and cross-appeal by the Crown (concerning the manner in which the Court of Appeal disposed of the Appeal) the Board opined¹⁵ that in its amended form the count correctly reflects the legal position. It found that contrary to the appellant’s contentions, the count as originally framed was not a nullity and was merely defective in a technical sense. Their Lordships were satisfied that the Court of Appeal was entitled to find that the particulars of the offence gave full and correct notice to the appellant of the facts alleged against him; that he was not prejudiced by the amendment and granting the amendment would not amount to a miscarriage of justice. They accordingly declined to disturb the decision of the Court of Appeal to amend the indictment.

[54] It was held:

“Their Lordships are not satisfied that this count could properly be described as a nullity as it referred to the correct section imposing the prohibition which was alleged to have been disobeyed. In any event, they consider that the power vested in the Court of Appeal by the comprehensive

¹⁵ Per Lord Fraser of Tullybelton, who delivered the Board’s opinion.

words of section 302 (“all defects and errors”) extends to amending the count. The power to amend an indictment after conviction can of course only be properly exercised provided that no injustice is caused to the person convicted.”¹⁶

[55] Lord Fraser of Tullybelton explained:

“In the present case the Court of Appeal stated that, having regard to the evidence for the prosecution and the nature and conduct of the defence, they considered that there would be no miscarriage of justice in substituting the appropriate penalty for the common law offence of conspiracy. Their Lordships read that as meaning that amendment would cause no injustice to the defendant. The Court of Appeal was clearly entitled to take that view as the defect in count 1 was of an essentially technical nature, and the particulars of the offence gave full and correct notice to the defendant of the facts alleged against him. Their Lordships see no reason therefore to interfere with the decision of the Court of Appeal to amend count 1.”¹⁷

[56] As to whether the Court of Appeal had the power to amend the count on the indictment after the trial had been concluded and the defendant had been convicted, their Lordships considered section 302 of the Judicature (Resident Magistrates) Act of Jamaica and ruled that it contains such power’. Section 302 states:

“It shall be lawful for the Court of Appeal to amend all defects and errors in any proceeding in a case tried by a magistrate on indictment or information in virtue of a special statutory summary jurisdiction, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made as to the court may seem fit.”

[57] While the facts of this case are not on all fours with the **Stewart** case, the principles enunciated by the Board and echoed by Dana Seetahal are of general application in appropriate cases. The twin cautions regarding the imperatives of protecting the appellant from miscarriage of justice and prejudice if amendment is being considered as an option are noted, endorsed and borne in mind for present purposes.

¹⁶ Ibid. at pgs. 301 – 302.

¹⁷ Ibid. at pg. 302.

- [58] As already pointed out and as evidenced by the record, the appellant's counsel and the learned DPP have acknowledged that section 35 of **the Ordinance** prescribes the penalty for failure to pay contributions to the SSB, such as employer and employee contributions. Without exception the material parts of the statements of offence and particulars of the eighty-four charges of failure to pay contributions, alleged respectively:

“Statement of Offence

Failing to make payment: Contrary to Regulation 10(1) of the Social Security (Contributions) Regulations, Chapter 266 of the Revised Edition 1991 of the Laws of the Virgin Islands.

Particulars of Offence

Brian Penn ..., Directors, Trading as Vanguard Security Services and Supplies Ltd. between ... day .. of ... and ... day of ... at East End, on the Island of Tortola, in the Territory of the Virgin Islands, being an employer you failed to transmit to the Director of the Social Security Board within fourteen days from the end of ..., together with the remittance form, the total amount of contributions due to wit, \$... by you and your employee ... during the said month in compliance with the provisions of Regulation 4 of the Social Security (Contributions) Regulations.”

- [59] The particulars of offence as contained in each charge against the appellant comports with the language in regulations 10(1) and section 35 of **the Ordinance**. They give full and ample notice to the appellant of the facts alleged against him. Further, the evidence led by the Crown in relation to each of the eighty-four charges relates to failure to pay contributions that may be caught both under regulation 10(1) and section 35 of the Ordinance. Additionally, the defence mounted by the appellant squarely addressed the breaches alleged in the particulars of the offence. In the circumstances, I am satisfied that the charges against Mr. Penn of failing to pay contributions under regulation 10(1) of the regulations were defective in that they did not include reference to section 35 of **the Ordinance** – the penalty provision. However, I consider this to be a technical drafting error, not going to the substance of the particulars of the offences, is not fatal and may be cured by amendment.

- [60] In my opinion, the appellant's contention that the learned magistrate erred by finding that an offence is created by regulation 10(1) is not borne out by a proper construction of the overarching legislative framework and the statutory context within which regulation 10(1) is to be construed. For the foregoing reasons, the no case submission made by the appellant with regard to the complaints of failure to pay contributions under regulation 10(1) would fail and the learned magistrate was correct to dismiss it. Accordingly, this aspect of the appellant's challenge to the learned magistrate's ruling on the no case submission is of no assistance to him.
- [61] But that is not the end of the matter. Although no application has been made by the Crown to amend the charges, I am of the considered opinion that it is a viable option that should be explored in furtherance of the administration of justice.
- [62] In view of those realities, in responding to the question whether the appellant would be prejudiced at this stage of the proceedings, by an amendment to the said counts to incorporate reference to section 35 of **the Ordinance**, the obvious and clear answer would be no. He cannot reasonably or justifiably argue that such an amendment would change the substance of the complaints by introducing further factual allegations of which he was unaware prior to the trial. I am satisfied that he had full and complete notice of all factual contentions from the inception of the prosecution and would therefore not be prejudiced. In my opinion, no miscarriage of justice would be occasioned to him because he has fully addressed his mind to the particulars of the offences and presented a substantive and substantial defence throughout the proceedings from inception to this stage.
- [63] Another consideration is whether this Court is empowered by statute to grant such an amendment. The **Magistrate's Code of Procedure Act** provides that the Court of Appeal may amend a complaint, information, conviction or order to correct any defect occasioned by an omission or mistake in drafting. In this regard, section 180 provides:

“180. If, on the hearing of the appeal-

- (a) any objection is made on account of any defect in a complaint or information, or on account of any omission or mistake in the drawing up of a conviction or order; and
- (b) if it is shown to the satisfaction of the Court of Appeal, that sufficient grounds were in proof before the Magistrate who made the conviction or order to have authorised the drawing up thereof free from that omission or mistake,

the **Court may amend the complaint or information**, or the conviction or order, **and proceed thereafter as if the defect, omission or mistake had not existed.**" (Emphasis added)

[64] I am satisfied that in the circumstances of this case and in light of the obvious technical defect in the charges due to the absence of a reference to section 35 of **the Ordinance**, it is appropriate for this Court to invoke section 180 of the **Magistrate's Code of Procedure Act** to cure the patent technical defect by amending the charges. I would accordingly amend the statement of offences in the eighty-four complaints (for failure to pay contributions) by inserting after the words 'contrary to', the words 'Section 35 of the Social Security Ordinance and'.

[65] The amended statements of offence would therefore state:

"Statement of Offence

Failing to make payment: Contrary to Section 35 of the Social Security Ordinance and Regulation 10(1) of the Social Security (Contributions) Regulations, Chapter 266 of the Revised Edition 1991 of the Laws of the Virgin Islands." (Amendment underlined)

Evasion of Liability by Deception
Appellant's Submissions

[66] With respect to the no case submission on the charges of Evasion of Liability by Deception, it was submitted on the appellant's behalf in the Magistrate's Court, that the offence specifically requires the Crown to prove that he dishonestly induced the Director of the SSB to wait for payment by deception by falsely pretending that he would do a particular thing. It was noted that the particulars of offence on each of the charges brought under section 218 of the **Criminal Code** expressly stated '...with intent to make permanent default in whole or in part on an existing liability to make a payment of \$... for the period of ... due for a new employee ...dishonestly

induced the Director of the Social Security Board to wait for payment by deception, namely, by falsely pretending that he would submit the remittance form with payment.'

[67] It was submitted that even if the Crown's case is taken at its highest, the offence specifically requires the Crown to prove that the appellant dishonestly induced the director of SSB to wait for payment by deception, the only evidence or source from which such evidence could come is through the investigating officer attesting to dishonest inducement by the appellant or, if someone from the SSB indicated that there was such dishonest inducement to force them to wait for payment. The appellant contended further that the Crown was unable to point to some positive evidence of dishonest inducement or dishonesty and Lisa McIntosh Bobb's evidence was not supportive of such a finding.

[68] Another argument advanced by the appellant was that the respondent invited the court below to infer dishonesty and permanent default in making the payments from the fact that some payments have been outstanding for approximately two years, a fact that could be accounted for as a simple delay in payment. Citing **R v Ghosh**¹⁸ it was submitted that there was no evidence of dishonesty and hence no case for the appellant to answer. The appellant also relied on **Ivey v Genting Casinos (UK) Ltd t/a Crockford**¹⁹ in support of his argument.

[69] Pointing to the learned magistrate's pronouncement that 'the Crown's case established that the contributions were deducted from the relevant employees (sic) salary but were not paid to the Director. ... Thus the behavior of the defendants can imply deception and there is no case to answer', the appellant argued that while it appears that the learned magistrate knew what the law requires, she erred in applying the law to the facts, concluded that there was 'implied deception' and as a result erred in dismissing the no case submission. It was submitted that the

¹⁸ [1982] EWCA Crim 2.

¹⁹ [2017] UKSC 67.

magistrate should have gone on to consider whether there was evidence of dishonest inducement by the appellant of the director of the SSB and such evidence was not elicited, therefore the magistrate erred in not upholding the no case submission.

- [70] The appellant contended that the agreements between Vanguard and the government for the latter to make payments on Vanguard's behalf to the SSB is evidence that the appellant did not intend to deprive the SSB of the payments permanently. The appellant reasoned that the absence of proof of the mens rea element renders the dismissal of the no case submission plainly wrong.

Respondent's Submissions

- [71] The respondent contended that to be successful in challenging the learned magistrate's decision the appellant has to demonstrate a lack of awareness by the learned magistrate of the applicable legal principles relevant to the determination of a no case submission or an incorrect exercise of her discretion. **Wendell Anthony and others v the Commissioner of Police**²⁰ was cited as authority for that proposition. In it, this Court held:

“A magistrate, as the judge of the facts and the law, must be taken to have been aware of and to have applied basic principles relative to the admission and treatment of evidence, unless the contrary is shown to be the case or his reasoning and decision were so clearly based on a lack of awareness or lack of application of the relevant legal principles.”

- [72] It was submitted that the learned magistrate did not err in principle and was correct to find that there was a case to answer. Placing reliance on **Malcolm Maduro v The Queen** and **DPP v Varlack**²¹ the respondent argued that in determining the no case submission the only concern for the magistrate was whether on the Crown's case a reasonable tribunal of fact could reach a conclusion of guilt by drawing reasonable inferences from the evidence. The respondent reasoned that on the Crown's case there was evidence on which a reasonable mind could make a finding of guilt.

²⁰ BVIMCRAP2014/0016 (delivered 23rd November 2016, unreported).

²¹ [2008] UKPC 56.

[73] The respondent contended that it had fully discharged the burden of proving each element of the offence to the requisite standard. In this regard, it was submitted that the Crown had to prove and did prove: 1) the appellant had an intent not to pay; 2) the whole or part of an existing liability, i.e. the employees' contributions to the SSB; and 3) that he dishonestly induced the SSB to wait for payment. It was also submitted that the Crown established each of those elements in that the appellant for over eighteen months in some cases (and in others for over a year) failed to pay the employees' contributions as stipulated by law; he was dishonest in his actions in that he made the required deductions of contributions from the employees' wages, yet failed to pay those contributions over to the SSB and did not give the affected employees any pay slips; he accepted that there were outstanding contributions; he gave SSB an undertaking to arrange for payment of those arrears through the Ministry of Finance yet submitted no remittance forms in respect of some of the outstanding payments and failed to rectify remittance forms that although submitted were rejected.

Discussion

[74] An appellate court that is invited to reverse a magistrate's ruling on a no case submission is required to evaluate the evidence to determine whether there was a case for the defendant to answer. In other words, as this Court explained in **Edwin Gomez v The Queen**²² the exercise focuses on the sufficiency of the evidence and not on whether the judicial officer correctly articulated the legal principles. A ruling on a no case submission involves the exercise of judicial discretion. It is well-settled that an appellate court will not lightly interfere with a decision emanating from exercise of a judicial discretion unless the ruling is plainly wrong having been arrived at through an error in principle that is informed by irrelevant considerations or failure to consider relevant factors or applicable legal principles. I remain mindful of these principles of law and others outlined earlier as I review the learned judge's decision against the evidence with respect to the evading liability by deception charges.

²² ANUHCRA2014/0012 (delivered 17th August 2022, unreported).

[75] The offence of Evasion of Liability by Deception is created by section 218(1)(b) of the **Criminal Code** which provides:

“218 (1) Subject to subsection (2), any person who, by any deception,
(a) ...
(b) With intent to make permanent default in whole or in part on any existing liability to make a payment, or with intent to let another do so, dishonestly induces the creditor to wait for payment (whether or not the due date for payment is deferred) or to forego payment, or
(c) ...
commits an offence and is liable
(i) on summary conviction to imprisonment for a term not exceeding one year.”

[76] ‘Liability’ is defined in subsection (2) to mean ‘legally enforceable liability’ and excludes liability that has not been accepted or established to pay compensation for a wrongful act or omission. ‘Deception’ is defined in section 217(4) to mean ‘any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person.’

[77] Before the learned magistrate, the no case submission centered on the assertion that there was no evidence of dishonesty which supplied the mens rea for the offence. Learned counsel for the appellant argued then that the charges alleged that he dishonestly induced the Director of the SSB to wait for payment by pretending that he would submit the remittance form for payment. The particulars of the charges were highlighted. As stated earlier, without exception they had in common the following particulars:

“Brian Penn ... directors trading as [Vanguard] Security Service and Supplies Limited between the ... and the ... at East End on the island of Tortola in the Territory of the Virgin Islands with intent to make permanent default in whole or in part on an existing liability to make payment of \$... for the period of ... due for ... employee ... dishonestly induced the Director of the Social Security Board to wait for payment by deception namely by falsely pretending that he would submit the remittance form with payment.”²³

²³ Vol. 1 Index of Records.

[78] As particularised, the offences of Evasion of Liability by Deception comprise four necessary ingredients all of which had to be proved by the Crown to secure the appellant's conviction on any and each of the sixty-seven counts. Those ingredients are:

- (1) the fact that the appellant was a director of Vangard at the time of commission of the offence ("the relevant time");
- (2). a) that at the relevant time at East End, Tortola the appellant intended to make permanent default;

b) in part or all of the payment of a specific amount of money for social security contributions to the SSB in respect of a specific Vangard employee.
- (3) the respective contribution was payable in respect of a specific period;
- (4) the appellant dishonestly induced the Director of SSB to wait for payment by dishonestly pretending that he would submit the remittance form to the SSB with payment.

[79] It is worth noting that the no case submission relates only to immediately preceding clause 2 b) and the fourth element of the offence. The appellant accepted that he was a director of Vangard at the material times and that contributions payable to the SSB on behalf of the named employees were due and outstanding and had not been paid before the end of the trial. It is also noteworthy that the appellant as part of his no case submission did not dispute that he intended to make default in part or whole of the payments of the said employees' contributions to the SSB. He contended however that the intention was not to make permanent default, implying that temporary default was contemplated or at least acknowledged. Likewise, he did not contest that the employees' contributions were due (in part or fully) and outstanding in respect of the named employees for the periods set out in the charges.

[80] The nub of the appellant's submissions is that the Crown failed to adduce evidence to establish a prima facie case against the appellant for the offence of Evasion of Liability by Deception, because no evidence was led of deception, deceptive inducement of the Director of the SSB or of an intention to permanently deprive the SSB of the employees' contributions. While accepting that the requisite *mens rea* could be proven inferentially, the appellant rejected the Crown's contentions that such an inference could be drawn from the evidence led.

[81] In relation to the sixty-seven charges of evasion of liability for which the appellant was convicted, the Crown's case essentially was that Messrs. Tamaisar, Syfox and Brower as well as Ms. McIntosh Bobb laid out a prima facie case in respect of each charge. The Crown relied on Ms. McIntosh Bobb's testimony to show that as Vanguard's Director, the appellant was obligated by **the Ordinance** to pay the employees' contributions ("the payments"), within 14 days of the end of each month; that in October 2012 the payments remained due and owing for up to two years and eighteen months respectively, in relation to contributions for Syfox, Brower, Tamaisar and Daley that were due statutorily in 2010 and 2011 respectively. The Crown's case was that the mere fact that payments remained outstanding over those extended periods amounted to compelling evidence of an intention by the appellant to permanently deprive the SSB of those contributions and the learned Magistrate was entitled to draw that inference from the evidence adduced.

[82] On this aspect of the no case submission the learned magistrate ruled:

"The defendants were also charged with evasion of liability by deception. Defence Counsel argued that deception had not been established by the Crown. The Crown argues that deception can be implied by the failure of the defendants to make the payments due.

The section requires that there be an intention to make a permanent default on an existing liability by dishonestly inducing the creditor to wait for payment. The Crown's case established that the contributions were deducted from the relevant employees (sic) salary but were not paid to the Director. This was in no way contradicted by the defence. Thus, the behavior of the defendants can imply deception and there is a case to answer."

- [83] The evidence relied on by the Crown was elicited from Messrs. Tamaisar, Brower, Syfox and Ms. McIntosh Bobb. The employees' accounts spoke to the circumstances of their employment, arrangements for payment of wages and salaries, deductions by the appellant of their social security contributions from their wages as reflected in pay slips produced by Vanguard each month and delivered to the employees with their wages, the subsequent discontinuation of in person payment of wages and presentation of pay slips to the employees, short pay of salaries on occasion and ultimately the discovery by employees that the appellant had not paid to the SSB the contributions deducted from their salaries or the employer's portion of the contributions which resulted in the denial of social security benefits such as the sickness benefit.
- [84] Ms. McIntosh Bobb's testimony supplied the factual context about the operations of the SSB and in particular that employers must pay contributions within prescribed and strict time limits – 14 days of the end of the month and inferentially if delayed, as soon as possible thereafter to facilitate and ensure the effective operation of the SSB system of insurance for employees. She also attested to the failure by the appellant to pay the contributions in question within those timelines and for extended periods of up to two years after the due dates and importantly about his failure to transmit the necessary remittance forms to facilitate accurate accounting, record keeping and collection of the payments.
- [85] For his part, the appellant confirmed Ms. McIntosh Bobb's evidence as to his failure to make the payments in a timely manner and for periods ranging from eighteen months to two years after the prescribed payment dates. Additionally, the appellant testified about the arrangements he made with the SSB to have the Ministry of Finance make payments directly to the SSB from contractual payments payable to Vanguard. He acknowledged that he did not submit the remittance forms in respect of the employees within the statutory periods and did not correct and re-submit remittance forms that had been rejected.

[86] Significantly, the evidence about the appellant-driven and engineered transition from payment of salaries directly to employees personally to direct deposits, created an environment within which errors in calculation and lack of accountability by the appellant to the employees proliferated. The employees' accounts that they received empty promises from the appellant to provide them with pay slips, correct their payment records, pay them the shortfalls in wages that were incorrectly and wrongly deducted, and to submit remittance forms to the SSB along with outstanding payments when viewed alongside Ms. McIntosh Bobb's testimony provided at the end of the Crown's case, more than sufficient evidence that outlined a prima facie case against the appellant for dishonest evasion of liability by deception as charged. The learned magistrate was entitled to find that the fact of the eighteen month and two-year failure to make payments was supportive of an inference that the appellant intended to permanently deprive the Director of the SSB of the payments. Such a conclusion is bolstered by the absence of evidence to demonstrate that the appellant made any effort to make any payments during those periods or to transmit the remittance forms to the SSB to support such payments.

[87] In the premises, I am satisfied that there was more than enough evidence on which the learned magistrate as the trier of facts could reasonably find that the Crown had laid out a prima facie case against the appellant at the end of its case; and had established the charges against the appellant of Evasion of Liability by Deception beyond a reasonable doubt at the close of the trial. There was therefore a case for him to answer on the sixty-seven counts of Evading Liability by Deception under section 218(1)(b) of the **Criminal Code**. The learned magistrate was therefore entitled to dismiss this aspect of the no case submission and to convict the appellant of those charges. I would hold that this ground of appeal fails.

Issue 2 - Sentence

Appellant's Submissions

[88] I turn next to consider the appeals against sentence. Citing **R v Newsome; R v Browne**²⁴ the appellant contended that the sentence passed was not justified in law and was passed on a wrong factual basis. It was submitted further that some matters were improperly taken into account and the sentences were manifestly excessive in the circumstances.

Respondent's Submissions

[89] The Crown submitted that the sentences were arrived at in accordance with the law, were appropriate and not excessive. It was argued that it was open to the learned magistrate in accordance with section 23(2) of the **Criminal Code** to impose a fine instead of a term of imprisonment.

[90] Acknowledging that the learned magistrate gave no reasons for the sentences imposed, learned counsel cited **Akim Monah v R**²⁵ as authority for the proposition that the Court of Appeal is required to determine whether the sentence is just and appropriate if the lower court fails to give reasons for the sentence. It was argued that the sentence is within the remit of the law and was fair under the circumstances. Learned counsel noted that the appellant was of good character and this was taken into account by the learned magistrate.

Discussion

[91] It is now settled that an appellate court will not interfere with a sentence passed by a lower court unless satisfied that a) the sentence is not justified in law; b) was passed on the wrong factual basis; c) the sentencer improperly took into account any irrelevant matter; or d) the sentence is manifestly excessive or wrong in principle. In **Director of Public Prosecutions v Shaunlee Fahie**²⁶ this Court noted: 'The imposition of a sentence unless specifically fixed by legislation involves the exercise of discretion by the sentencer.'

²⁴ [1970] 2 QB 711; 54 Cr. App. R. 485.

²⁵ GDAHCRAP2021/0015 (delivered 23rd February 2022, unreported).

²⁶ BVIHCRAP2008/003 (delivered 11th January 2010, unreported).

- [92] The sentences imposed by the learned magistrate for breach of regulation 10(1) of **the Regulations** were anchored in section 35(1) of **the Ordinance** which stipulates a maximum penalty of one hundred dollars and in default of such fine, imprisonment for a term not exceeding one month. The learned magistrate did not articulate any reasons for imposing the maximum fine for contravention of those provisions.
- [93] A conviction of Evasion of Liability by Deception under section 218(1)(b) of the **Criminal Code** attracts a penalty of imprisonment for a term not exceeding one year. No alternative sentence of a fine was prescribed. Accordingly, section 23(2) of the **Criminal Code** would apply if a fine is contemplated as the suitable sanction. It provides: ‘Subject to the provisions of this Code or any other law, a person liable to imprisonment may be sentenced to pay a fine in addition to or instead of imprisonment.’
- [94] Section 19(10)(a) of the **Interpretation Act** of the Virgin Islands²⁷ is also relevant. It states:
- “(10) Where an enactment confers a power to make a statutory instrument –
(a) there may be annexed to a contravention of that statutory instrument a punishment by way of a fine not exceeding five hundred dollars or imprisonment for a term not exceeding six months or both;” (Emphasis added)
- [95] When read with section 19(10) of the **Interpretation Act**, the effect of section 23(2) of the **Criminal Code** is to empower the sentencer to impose a fine of up to five hundred dollars on a person convicted of Evasion of Liability by Deception under section 218(1)(b) of the **Criminal Code**.
- [96] It is noteworthy that the fines imposed by the learned magistrate for the offences were the maximum. It is trite law that the maximum sentence is reserved for the most serious of any offence. Likewise, it is settled law that a tribunal must provide

²⁷ Cap. 136 of the Laws of the Virgin Islands.

reasons for arriving at its decision. Failure to do so justifies interference by an appellate court unless it is possible to discern the reasons for the decision from the judgment. The absence of reasons for imposing the highest permissible sentences, exposes the learned magistrate to the justifiable criticism that she erred in principle in sentencing the appellant. It therefore falls to this Court to sentence him.

[97] In crafting a sentence, the Court must remain mindful of the four aims of sentencing, namely deterrence, retribution, punishment and rehabilitation. The Court will also endeavour to seek to promote consistency in sentencing as far as practicable, and give effect to settled principles of law having regard to the facts of the case under consideration. In **Desmond Baptiste v R**²⁸ this Court ruled that it is necessary to consider the sentence range, identify an appropriate starting point, the relevant mitigating and aggravating factors and any other relevant circumstances. If applicable, credit must be granted for time spent on remand.

[98] I will consider first the offences related to the contravention of regulation 10(1) of **the Regulations**. Of note is that the appellant was of good character, not having been convicted of any offences previously. Aggravating of the offence is that the offences were numerous and committed over a period of two years and involved a breach of trust the effect of which had adverse consequences for the employees in that they were unable to benefit from the protection offered through the social security insurance system. I also note that under section 37 of **the Ordinance**, the SSB is entitled to recover the outstanding contributions from the appellant as a civil debt. Taking those circumstances into account, I would fix the starting point at midway in the scale at \$100.00. Adjusting for the appellant's good conduct I would discount by \$50.00 to \$50.00 per count and on account of the aggravating features adjust upwards by \$25.00 to \$75.00. I would accordingly impose a fine of \$75.00 in respect of each of the eighty-four counts of failure to pay contributions under regulation 10(1) of the regulations, for a total of \$6300.00.

[99] The aggravating and mitigating features remain the same with respect to the Evasion of Liability by Deception charges. For the same reasons articulated with respect to breach of regulation 10(1) I would use a starting point at the mid-range of the maximum, being \$250.00. Adjusting for the appellant's good conduct I would

²⁸ Saint Vincent and the Grenadines Crim Appeal No. 8 of 2003 (delivered December 6th 2004, unreported).

discount by \$50.00 to \$200.00 per count and on account of the aggravating features adjust upwards by \$150.00 to \$350.00. I would accordingly impose a fine of \$350.00 in respect of each of the sixty-seven counts of Evading of Liability by Deception under section 218(1)(b) of **the Criminal Code**, for a total of \$23,450.00.

[100] Section 24(1)(c) of the **Criminal Code** empowers the Court to include as part of a sentence of a fine, an order that in default of payment of the fine the offender 'shall suffer imprisonment for a term not exceeding the maximum term in section 25, ... in addition to and consecutive with any other imprisonment to which he may have been sentenced and may be liable under a commutation of sentence.' Section 25 prescribes a sliding scale against which a default imprisonment term is established. Where the sum of money adjudged to be paid exceeds \$2000.00 the term of imprisonment in default is not to exceed six months.

[101] In all of the circumstances of this case I am of the view the default term of imprisonment ought to be fixed at six months in light of the large number of offences for which the appellant was convicted. Accordingly, I would order that in default of payment of the fines imposed for breach of regulation 10(1) and section 218(1)(b) of the **Criminal Code**, the appellant shall serve a term of imprisonment of six months.

Disposition

[102] I would make the following orders:

- (1) The appellant's appeal against his convictions for failure to make payments to the Social Security Board of the employees' contributions, contrary to regulation 10(1) of **the Regulations** is dismissed and the convictions are affirmed.
- (2) The appellant's appeal against his convictions for the offences of Evasion of Liability by Deception under section 218(1)(b) of the **Criminal Code** is dismissed and his convictions are affirmed.
- (3) The appellant's appeal against his sentences is allowed and the sentences are quashed.

- (4) The appellant is sentenced to a fine of \$75.00 in respect of each of the eighty-four counts of failure to pay contributions contrary to regulation 10(1) of **the Regulations**, making a total of \$6300.00, to be paid forthwith²⁹, in default imprisonment for a term of six months.
- (5) The appellant is sentenced to a fine of \$350.00 in respect of each of the sixty-seven counts of Evasion of Liability by Deception contrary to section 218(1)(b) of **the Criminal Code**, making a total of \$23,450.00, to be paid forthwith²⁹, in default imprisonment for a term of six months.

[103] I gratefully acknowledge the assistance provided by both learned counsel.

I concur.
Vicki Ann Ellis
Justice of Appeal

I concur.
Dexter Theodore
Justice of Appeal [Ag]

By the Court

Chief Registrar

²⁹ Inadvertent omission corrected after oral delivery of judgment.