



1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CRIMINAL DIVISION**
3

4 **SCA: 0004 OF 2022**
5 **Charges 00424/2020**
6

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8
9 **KELLIANN ASSHIKPELOKHAI T/A PIRATES EATERY**

10
11 **V.**
12

13 **R**
14

15
16 **Appearances:** **The Appellant in Person**
17
18 **Mr. Greg Walcolm, Senior Crown Counsel for the Respondent**
19 **Before:** **Justice Cheryll Richards KC**
20 **Submissions Heard:** **10th March 2023**
21
22 **Judgment:** **24th March 2023**
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25

26 **HEADNOTE**
27

28 *Criminal Law—Failure to pay wages on a regular periodic basis contrary to s.31 (1)*
29 *(c) and s.30 of the Labour Act and Failing to Pay Overtime contrary to s. 25 (4) of the Labour Act.*
30 *Appeal (against conviction and sentence) from the Summary Court to the Grand Court.*
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1 *or matter to which he is a party may appeal to the Grand Court against such*
2 *judgment, sentence or order either by motion on matters of law or fact (or both)*
3 *or by way of case stated on a point of law only as hereafter provided: ...”*
4

- 5 7. The Court’s powers on an appeal from a decision in the Summary Court are set out in s.181 of
6 the *Code*.

7
8 *“181. The court may adjourn the hearing of the appeal, and may, upon the*
9 *hearing thereof confirm, reverse, vary or modify the decision of the Summary*
10 *Court, including the passing of some other sentence (whether more or less severe)*
11 *or remit the matter to the Summary Court for retrial, or may make such other order*
12 *in the matter as it may think just, and may, by such order, exercise any power*
13 *which the Summary Court might have exercised, and such order shall have the*
14 *same effect and may be enforced in the same manner as if it had been made by the*
15 *Summary Court: Provided that the court may, notwithstanding that it is of the*
16 *opinion that the point raised in the appeal might be decided in favour of the*
17 *appellant, dismiss the appeal if the court considers that no substantial miscarriage*
18 *of justice has actually occurred.”*
19

20 **GROUNDS OF APPEAL**

- 21
22 8. The Appellant advances two grounds of appeal as follows: -
23

- 24 i. That the Summary Court had no jurisdiction to hear the charges as they were laid out
25 of time.
26 ii. That the learned Magistrate failed to properly consider the Appellant’s evidence which
27 was presented at trial.
28

- 29 9. The facts may be summarised from the ruling of the learned Magistrate (“the Magistrate”). In
30 2019, the Appellant and her husband operated a restaurant known as “Pirates Eatery”. Between
31 May and July 2019, the Appellant employed the complainant Larkland Green as a chef. The
32 evidence of Mr. Green at trial was that he was paid on a bi-weekly basis the sum of \$800.00
33 by cheque. He worked six days per week and was off on Sundays. His usual work hours were
34 from 5:30am to about 9:30pm at night. He testified that he left the job in July 2019 and was not



1 paid \$800.00 for his final two weeks. It was also his evidence that on the commencement of
2 his employment, the Appellant had agreed to pay him overtime. After a while she told him that
3 he would not be paid overtime but would receive time in lieu. He did not receive this for much
4 of the period that he worked. On the 26th August 2019 he reported the matter to the Department
5 of Labour and Pensions (“DLP”).
6

7 10. On the 10th February 2020, he provided a detailed spreadsheet of his overtime showing that he
8 was entitled to be paid \$2,643.65. He said that all arrangements with the Appellant had been
9 made orally. Nothing had been provided in writing.
10

11 11. The second witness for the prosecution was Ms. Sasha Rankine, a Senior Labour and Pensions
12 Inspector of the DLP. Her evidence was that having received the complaint on the 26th August
13 2019, she thereafter made contact with the Appellant about it. Between the first contact with
14 the Appellant on 5th September 2019 and the 10th February 2020, the Appellant did not deny
15 owing the \$800.00 but denied owing any overtime payments. Ms. Rankine stated that the DLP
16 had never received an application for a waiver of overtime from the Appellant.
17

18 12. The Appellant gave evidence on oath. She denied owing the \$800.00 and said that Mr. Green’s
19 resignation was effective on the 6th July 2019, his last day of work and that he was paid at that
20 time. In response to cross-examination, the Appellant explained not having previously raised
21 the fact of this payment between September 2019 and February 2020 by saying: -
22

23 *“...that she was overwhelmed and that Ms. Rankine kept “plaguing me” so she at*
24 *first admitted owing the \$800.00. It was only after she looked closely at the matter*
25 *did she realise that he was paid. She even said that she told Ms. Rankine this –*
26 *though nothing was raised to Ms. Rankine about this and [it] is contrary to all Ms.*
27 *Rankine said.”¹*
28

29 13. The Appellant accepted in evidence that she was raising the fact of payment for the first time.
30

31 14. As to the overtime payments, the evidence of the Appellant at trial was that Mr. Green had a
32 managerial position and was not entitled to overtime. She further stated that even if he was

¹Paragraph 25 of the Ruling of the Magistrate dated 14th December 2021
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1 entitled to overtime, he did not work the number of hours that he claimed. She admitted that
2 she had agreed to pay overtime initially. She agreed in cross- examination that she was
3 describing Mr. Green as a manager for the first time.

4
5 15. The magistrate reminded herself of the burden and standard of proof before making a number
6 of findings of fact. These included the acceptance of the evidence of Mr. Green whose evidence
7 that he gave notice and worked the notice period was found to be supported by his resignation
8 letter and the finding that he had not been in a managerial position. The magistrate found that
9 the only persons who supervised or managed were the Appellant and less so her husband who
10 paid wages and sent out work schedules.

11
12 16. No proof of the payment was provided for the wages and it was said that the original cheque
13 could not be located. The Magistrate rejected the account of the Appellant on key factual
14 matters and said this: -

15
16 *“The defendant has changed her position in relation to the basic wages and her*
17 *view of overtime. She is an intelligent woman, and her shifting position questions*
18 *her evidence. She has moved from accepting that overtime was promised, then*
19 *changed to no overtime was worked, then accepting he worked one day of time in*
20 *lieu, and then rejecting the schedule of overtime hours as being inconsistent and*
21 *falsified. It is difficult to understand exactly what the position of the defendant is.”*

22
23 17. The Magistrate found that overtime was agreed and then changed to time in lieu. The
24 Magistrate found that the complainant did not get the time in lieu owed to cover the overtime.

25
26 18. It was also found that there was no waiver of overtime applied for by the Appellant with the
27 DLP. The overtime hours submitted were not challenged in any way to question the veracity
28 of the hours. Accordingly, the Magistrate stated that overtime payments were outstanding and
29 owed for the hours claimed.



1 **THE SUBMISSIONS ON APPEAL**

2
3 **GROUND 1**

4
5 *That the Summary Court had no jurisdiction to hear the charges as they were laid out of time.*

6
7 19. On appeal before this Court, the Appellant submitted that Mr. Green had brought his complaint
8 to the attention of the DLP in August 2019. The DLP is a competent complainant within the
9 meaning of the relevant *Code*. The Appellant submitted that the charges which are required to
10 be laid within six months of the complaint coming to the attention of a competent complainant
11 were not laid until the 10th March 2020 and that this was evident from the case history. The
12 Appellant submitted that the Summary Court should have dismissed the charges because of the
13 six-month time limit. The Appellant placed reliance on the decision of the Summary Court
14 dated 24th March 2015 in the case of *Dean and Jennifer Scott Trading as Island Builders*.²

15
16 20. Section 78 of the *Criminal Procedure Code* (2019 Revision) provides for a six-month
17 limitation for the laying of summary only charges. It states as follows: -

18
19 *“78. Except where a longer time is specially allowed by law, no offence which is*
20 *triable summarily shall be triable by a Summary Court unless the charge or*
21 *complaint relating to it is laid within six months from the date on which evidence*
22 *sufficient to justify proceedings came to the actual or constructive knowledge of a*
23 *competent complainant:*

24
25 *Provided that if the circumstances giving rise to the complaint or charge occurred*
26 *upon a vessel upon the high seas, then the court shall have jurisdiction in respect*
27 *thereof if the complaint or charge was laid within six months after the arrival of*
28 *the vessel at that vessel’s port of discharge in the Islands.”*

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² Charge 01940/2014 and 02137/2014



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2 21. In the case of **R v. Eldemire**³, Sanderson J, held that “evidence sufficient to justify proceedings”
3 does not require proof beyond a reasonable doubt. It requires no more than reasonable and
4 probable grounds for believing that the accused committed the offence.

5
6 22. The Respondent accepts that the DLP is the competent complainant in this case. Counsel also
7 accepts that based on the dicta in the cited case that the complaint of Mr. Green made to the
8 DLP would amount to evidence to justify proceedings.

9
10 23. The case therefore turns on the calculation of time from the 26th August 2019 when Mr. Green
11 made his complaint to the date the charges were laid. The date the charges were laid is
12 evidenced by the Court seal on the face of the charges which is the 27th February 2020.

13
14 24. Counsel for the Respondent relies on s.8 of the **Interpretation Act** (1995 Revision), by which
15 for the computation of time, two days over the period would be excluded from the calculation.
16 These are the day that the complaint was made and the last day of the period, 26th February
17 2020, this being a public holiday, Ash Wednesday. The section states: -

18
19 *“In computing time for the purpose of any Law, unless the contrary intention*
20 *appears —*

21
22 *(a) a period of days from the happening of an event or the doing of any act or thing*
23 *shall be deemed to be exclusive of the day in which the event happens or the act or*
24 *thing is done;*

25
26 *(b) if the last day of the period is Sunday or a public general holiday (which days*
27 *are in this section referred to as excluded days) the period shall include the next*
28 *following day, not being an excluded day;*

29
30 *(c) when any act or proceeding is directed or allowed to be done or taken on a*
31 *certain day, then if that day happens to be an excluded day, the act or proceeding*
32 *shall be considered as done or taken in due time if it is done or taken on the next*

³ [2000] CILR 97

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1 *day afterwards, not being an excluded day; and (d) when an act or proceeding is*
2 *directed or allowed to be done or taken within any time not exceeding six days,*
3 *excluded days shall not be reckoned in the computation of the time.”*
4

5 25. I accept that given the provisions of this *Act*, the six-month period would therefore end on the
6 27th February 2020, the day the charges were laid. I conclude that the charges were laid within
7 the statutory time limit.



8
9 **GROUND 2**
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11 *That the Learned Magistrate failed to properly consider the Appellant’s evidence presented at trial.*
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13 26. The Appellant submitted that initially the DLP had only told her about one charge and
14 subsequently two further charges were added. She was not told about the further charges until
15 about a month afterward. The Appellant also submitted that the Magistrate rejected the
16 evidence that there was a statement of wages. This was evident from a receipt which showed
17 that Mr. Green had been paid. Mr. Green was saying that it was for a different period.
18

19 27. In relation to the overtime, the Appellant stated that she did have a meeting with Mr. Green,
20 and it was agreed with him that he was not entitled to overtime. She said that the Magistrate
21 did not accept that he gave instructions to staff. She said that initially the staff were being paid
22 overtime, however the business was not making enough money to pay overtime. After that she
23 told staff that no overtime would be paid. They would not be able to keep the business afloat if
24 they did. She said that there were many statements made by Mr. Green which would highlight
25 that he was in fact lying and that the Magistrate did not consider and take all of the evidence
26 into account in arriving at her decision.
27

28 28. Counsel for the Respondent submitted in reply that the Magistrate’s findings of fact were
29 clearly supported by the evidence. With respect to the charge of failure to pay the \$800.00, no
30 pay slip was ever provided. The Appellant entered into discussions with the DLP about the
31 failure to pay and accepted that the amount was owed to Mr. Green for the specific period that
32 was complained about. When the Appellant came to give evidence, her evidence was contrary
33 to this.
34



1
2 29. As to the overtime, Counsel for the Respondent submitted that the spreadsheet provided by Mr.
3 Green was not contradicted by any documentary evidence. The Appellant’s evidence that he
4 was a manager had never been raised with Mr. Green or Ms. Rankine.

5
6 30. I have considered all the submissions made. It is noted that the Appellant was first summoned
7 to appear in Court on the 14th April 2020 as is reflected on the charge sheets. The trial took
8 place over three days in November 2021. The Appellant would have had ample time after
9 becoming aware of all charges to prepare for her trial.

10
11 31. At paragraphs 24 to 25, of the ruling, the Magistrate set out the Appellant’s case and detailed
12 the evidence given by the Appellant at trial. The evidence for the prosecution was also detailed
13 in the ruling.

14
15 32. The Magistrate as tribunal of fact had the opportunity to see and hear the witnesses and to
16 determine what weight was to be given to their evidence. There were a number of
17 inconsistencies in the account given by the Appellant in circumstances where in evidence she
18 was making statements or assertions which had never been raised before. It was clearly open
19 to the Magistrate to find that the Appellant was not a witness of truth and to reject her accounts
20 as being untruthful.

21
22 33. The Magistrate approached the evidence on the prosecutions’ case with the cardinal principle
23 in mind as to the burden and standard of proof.

24
25 34. The focus of the appeal is on the facts. As such, I have asked myself the questions raised in the
26 cases of *Voiculescu v. R*⁴ and *Bertolino v. R*⁵, two cases dealt with by the Grand Court, to wit:

27
28 *“(a) whether the reasons the lower court gave for its conclusions were*
29 *satisfactory—if not, the decision is “at large” for the appellate court;*

30
31 *(b) whether the lower court took “proper advantage” of seeing and hearing the*
32 *witnesses—if not, the decision is again “at large” for the appellate court;*

⁴ [2010] (1) CILR Note 14

⁵ [1990–91] CILR 112

1
2 *(c) whether, if the lower court did not misdirect itself, any inclination to disagree*
3 *with the lower court can be explained by the fact that the appellate court has not*
4 *seen or heard the witnesses—if so, it may not interfere; and*

5
6 *(d) whether it can come to “any satisfactory conclusion” on the facts.”*
7

8 35. In my view the Magistrate gave reasons for the conclusions reached which are not
9 unsatisfactory. Proper advantage was taken of seeing and hearing the witnesses. The Magistrate
10 in her findings noted observations with respect to Mr. Green that he did not appear to her to be
11 illiterate or scheming. There is no misdirection in law which is identified on the part of the
12 Magistrate. There is no merit in this appeal. The appeal is dismissed, and the convictions and
13 sentences are affirmed.

14
15 36. The Appellant is given time to pay the amounts owing as follows: -

- 16
17 i. \$800.00 compensation to Larkland Green or 2 weeks imprisonment.
18 ii. \$2,643.00 compensation to Larkland Green or 6 months imprisonment.
19 iii. The total sum of \$3,443.00 is to be paid through the Court Funds Office
20 for Larkland Green at a rate of \$375.00 per month. The first payment is to
21 be made on the 28th day of April 2023 and the payments are to continue
22 on the 28th day of each month thereafter until completion.
23
24

25 **Dated this the 24th day of March 2023**

26 

27 **Honourable Justice Cheryll Richards KC**
28 **Judge of the Grand Court**