

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CRIMINAL SIDE
3

4 SCA No: 20/2012
5 Case No: 05947/2012

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7 JOSEFINA PROTACIO

8 V

9 THE QUEEN
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15 **Appearances:**

**Mr. Ben Tonner of Samson and McGrath
for the Appellant**

**Mr. Matthew Coles for the
Crown/Respondent**

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21 **Before:**

The Hon. Mr. Justice Charles Quin

22 **Sentencing Submissions Heard:**

28th November 2012

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24 **RULING**
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26 1. On the 28th November 2012 I dismissed the Appellant's appeal against the decision
27 of the learned Magistrate, Mrs. Kirsty-Ann Gunn, that the total of 74 days
28 imprisonment she imposed for four separate offences against the Immigration Law
29 was manifestly excessive and wrong in principle. I undertook to provide written
30 reasons for my decision which I now deliver.

31 2. On the 14th November 2012 the Immigration Department of the Cayman Islands
32 laid four charges against the Appellant contrary to the Immigration Law (2011
33 Revision).

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i. Charge 1 – Case #05947/2012: Using a false passport contrary to s.104(1)(c) of the Immigration Law. The particulars of this offence are that the Appellant, on the 16th September 2011 used a Republic of the Philippines passport #EB1873695 purporting to be one Estrellita Lansadiras Marturillas d.o.b. 28th October 1956 on arrival to the Cayman Islands misleading officers of her true identity.

ii. Charge 2 – Case #05947/2012: Making a false representation contrary to s.104(1)(a) of the Immigration Law. The particulars of this offence are that the Appellant, on the 14th March 2012 purported to be one Estrellita Lansadiras Marturillas within an application for the grant of a work permit, knowing the said information to be false or not believing it to be true.

iii. Charge 3 – Case#05947/2012: Failing to answer fully and truthfully contrary to s.101(1)(a) of the Immigration Law. The particulars of this count are that the Appellant in Grand Cayman on the 26th July 2012 identified herself as “Estrella” to Assistant Chief Immigration Officer Jeremy Scott knowing the information to be incorrect or believing it not to be true.



iv. Charge 4 – Case #05947/2012: Illegal landing contrary to s.78(1)(a) of the Immigration Law. The particulars of this charge are that the Appellant on the 16th September 2011 at Owen Roberts International Airport, George Town, Cayman Islands, illegally entered the jurisdiction without receiving specific permission from an Immigration officer.

- 1 3. On the 16th November 2012 in the Summary Court of the Cayman Islands this
2 Appellant pleaded guilty to all four offences under the Immigration Law (2011).
- 3 4. On the 19th November 2012 the learned Magistrate, Ms. Kirsty-Ann Gunn, imposed
4 on this Appellant (the Defendant) a sentence of 74 days imprisonment broken down
5 as follows:
- 6 a. On Count 1- Using an irregular passport: 40 days imprisonment;
- 7 b. On Count 2 – Making a false representation: 14 days imprisonment consecutive
8 to Count 4;
- 9 c. On Count 3 – Failing to answer fully and truthfully: 7 days imprisonment
10 concurrent to all;
- 11 d. On Count 4 – Illegal landing: 60 days’ imprisonment concurrent with Count 1.
- 12 5. On the 19th November 2012 I granted the Appellant bail pending her Appeal against
13 the sentence imposed by the learned Magistrate.
- 14 6. On the 28th November 2012 the Appellant filed her Notice of Appeal on the ground
15 that the sentence imposed by the learned Magistrate was manifestly excessive and
16 wrong in principle.

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THE FACTS

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7. This Appellant had applied for and obtained a passport in her sister's name. To

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obtain this passport the Appellant had used genuine documents obtained from her

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sister and submitted them to the passport authorities in the Philippines along with a

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photograph of herself, the Appellant.

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8. On the 11th July 2011, before the Appellant had arrived in the Cayman Islands, a

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Caymanian lady, Ms. Flossiebell Maragh, ("Ms. Maragh") had applied to the

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Cayman Islands Immigration Department for a temporary work permit to allow her

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to employ a domestic helper named Estrellita Marturillas. This application for a

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temporary work permit was granted on the 11th July 2011 and was valid until the

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12th December 2011.

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9. On the 16th September 2011 the Appellant arrived on Grand Cayman under the

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assumed identity of Estrellita Marturillas – presenting a Republic of the Philippines

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passport in the name of Estrellita Marturillas, who is the Appellant's sister.

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10. On the 14th March 2012 Ms. Maragh submitted an application to the Cayman

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Islands Immigration Department for a 12-month work permit for Estrellita

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Marturillas. As part of the application process documentation bearing the purported

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signature of Estrellita Marturillas was submitted. This Appellant had signed her

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sister's name beside a declaration of truth contained within the application for the

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work permit. There was also a Royal Cayman Islands Police Service (RCIPS)

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criminal check – again submitted and presented in the Appellant's sister's name.

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11. On the 17th March 2012 this application for a 12-month work permit was granted

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and made valid until the 17th March 2013.



SUBMISSIONS ON BEHALF OF THE APPELLANT

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18. The Appellant's daughter, May Protacio, had been living and working in the Cayman Islands since 2007. In 2008 the Appellant's daughter secured employment with the Cayman Islands Government and in November 2009 she married a Caymanian gentleman, Wilfred Douglas. On the 6th December 2010 the Appellant's daughter, now May Douglas, gave birth to her first child, Jessie May Douglas.

19. The Appellant's daughter has been unable to return to the Philippines since leaving in 2007 due to financial constraints. The Appellant therefore made arrangements to visit the Cayman Islands to see her daughter.

20. The Appellant made the arrangements to obtain a work permit in her sister's name as a domestic helper and, in due course, the Appellant's husband also made arrangements to travel to the Cayman Islands.

21. As soon as the true identity of the Appellant was uncovered, she apologized and counsel for the Appellant asks the Court to take into account the guilty plea which was made by the Appellant at the very first opportunity.

22. In addition, on the 29th September 2012 the Appellant's husband, (who had arrived in Cayman on the 19th May 2012), suffered a seizure and was rushed by ambulance to hospital. It was discovered that he had a tumor on his brain. The Appellant's husband was airlifted to the Philippines on or around the 5th October 2012. The Appellant's husband has since undergone surgery to remove the tumor and is currently convalescing in the Philippines with regular medical attention.

23. Mr. Tonner, counsel for the Appellant accepts that the learned Magistrate prepared a well reasoned Judgment to support the sentences she imposed.

1 24. Counsel for the Appellant accepts that the learned Magistrate took into account that
2 the Appellant's motive for committing these offences was to see her daughter and
3 her granddaughter. Counsel also accepts that the Magistrate took into account that,
4 as a result of her conviction the Appellant would be forced to return to the
5 Philippines and then be separated from her daughter and granddaughter.

6 25. However, counsel for the counsel Appellant submits:

7 a. The learned Magistrate overlooked the primary reason for Mr. Tonner's
8 submission not to impose a custodial sentence upon the Appellant, which was
9 the pressing need for the Appellant to return to the Philippines to care for her
10 husband.

11 b. The learned Magistrate failed to consider the imposition of a sentence under the
12 Alternative Sentencing Law 2008, such as a conditional release under s.45.

13 c. The learned Magistrate should not, in all the circumstances, have imposed a
14 custodial sentence at all.

15 26. The Appellant's counsel accepts that in an ordinary case of illegal landing and
16 possession of an irregular passport, the sentence may well meet and surpass the
17 custody threshold. However, counsel submits that this is not an ordinary case.

18 27. The Appellant's counsel submits that there are exceptional circumstances to be
19 considered in this case, in that, the sudden illness of, and major surgery undergone
20 by, the Appellant's husband are exceptional circumstances and, consequently, the
21 Appellant should not have received a custodial sentence. The Appellant's counsel
22 submits that a custodial sentence prevents the Appellant from immediately



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returning to be with her husband and therefore is disproportionately harsh, unfair and unjust.

28. For the above reasons the Appellant’s counsel submitted that the sentence was wrong in principle, in that, a custodial sentence should not have been passed and therefore it was manifestly excessive. The Appellant’s counsel therefore urges the Court to substitute a sentence which allows the Appellant to return to the Philippines to be with her husband, including the option of a suspended sentence.

29. In making this recommendation counsel for the Appellant relies on the case Attorney General’s reference (No. 23 of 2009) (*R v. Merrion*) [2010] 1 Cr App R. S 70 CA where it was held that the fact that one of the offender’s children suffered from an aggressive and debilitating (possibly fatal) illness was capable of amounting to an “exceptional” circumstance.



1 *SUBMISSIONS BY THE CROWN*

2 30. Counsel for the DPP, highlights the fact that under the Immigration Law the
3 punishment for offences contrary s.101 and s.104 are governed by s.110(i) of the
4 Immigration Law. Consequently, the maximum penalty for Counts 1 to 3 on a first
5 offence is a fine of five thousand dollars and imprisonment for one year.
6 Furthermore, the Crown points out that the offence of illegal landing, Count 4, has a
7 significantly higher maximum penalty of a fine of twenty thousand dollars and
8 imprisonment for five years.

9 31. Crown counsel confirmed that the learned Magistrate had been provided with the
10 UK Crown Prosecution Service Sentencing Manual for possession of false identity
11 documents and possession of a false identity document with improper intent, dated
12 January 2012. Crown counsel submits that these guidelines relate to comparable
13 UK legislation under the Identity Documents Act 2010. Under this Act, simple
14 possession of a false identity document is an either-way offence, with a maximum
15 sentence of two years on indictment, or six months summarily, with a fine.
16 Possession of such a document with improper intent is an indictable-only offence
17 for a maximum sentence of ten years.

18 32. Crown counsel submits that, following on from the English cases, the learned
19 Magistrate did not err in imposing the custodial sentences and furthermore, the
20 sentences were not manifestly excessive. Crown counsel also submits that in light
21 of the guidelines and the case law, it cannot be argued that the sentences imposed
22 by the learned Magistrate were wrong in principle.



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THE LAW

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33. I turn now to consider some of the cases in the United Kingdom for similar offences.

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34. In *R v. L Daljit Singh* [1999] 1 Cr App R (S) 490 the English Court of Appeal upheld a sentence of 8 months imprisonment for attempting to board a flight by means of a false passport. It confirmed that the integrity of the passport system must be maintained and deterrent sentences are required. The Court of Appeal in *Singh* also stated that, save in exceptional circumstances, custodial sentences should be imposed.

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35. In *R v. Kolawole* [2005] 2 Cr App R (S) the Defendant was arrested for driving erratically and found in possession of two false passports. The English Court of Appeal dismissed the Appeal and stated that 16 months could not be said to be manifestly excessive. Furthermore, the Court of Appeal stated that the appropriate sentence, even on a guilty plea by a person of good character, should now usually be within the range of 12 months to 18 months.

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36. In *R v. Blake* [2008] EWCA Crim 505 the Defendant was an illegal overstayer. He was found to be in possession of a false driving licence and, in showing it to a police officer, claimed to be that other person. In his interview the Defendant admitted that the licence had been copied and his own photo inserted. The Defendant had used the false driving licence in order to obtain gainful occupation and was sentenced to 9 months imprisonment. Sir Peter Cresswell handing down the Judgment of the English Court of Appeal stated:

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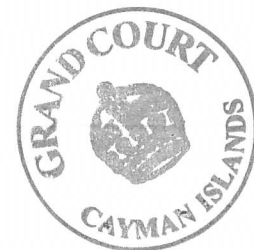
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1 *“In all the circumstances in the opinion of this court, the sentence imposed was*
2 *within the appropriate sentencing bracketand was not manifestly excessive*
3 *or wrong in principle.”*

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5 37. I note that the learned Magistrate relied on the general principles expressed by the
6 English Court of Appeal in *R v. Ovieriakhi* [2009] EWCA Crim 452, which had
7 consolidated and reviewed the previous cases referred to in paragraphs 34 to 36.
8 The learned Magistrate noted that the following principles can be extracted from
9 the authorities:

- 10 *i. Possession of a false passport with intent to obtain entry to a*
11 *jurisdiction is more serious than possession of a false passport with*
12 *intent to gain employment or a bank account;*
- 13 *ii. In cases of possession with intent to gain entry, a deterrent sentence is*
14 *required;*
- 15 *iii. Whenever a case is on the spectrum, a custodial sentence is likely, save*
16 *in exceptional circumstances.*
- 17 *iv. A custodial sentence is appropriate even following a guilty plea by a*
18 *person of good character;*
- 19 *v. These types of offences are considered serious because they undermine*
20 *proper immigration control.*
- 21 *vi. These types of offences are considered serious because they undermine*
22 *proper Immigration control. This is of particular importance for the*
23 *Cayman Islands given its size, economy and population.”*



1 *ANALYSIS AND CONCLUSION*

2 38. The learned Magistrate noted that many of the cases involved forged passports
3 rather than irregular passports and noted that the maximum penalties in the United
4 Kingdom were significantly higher than the maximum penalties under our
5 Immigration Law.

6 39. It is clear from reading the learned Magistrate’s Sentence Ruling that she
7 considered other penalties, including the imposition of a conditional discharge and
8 the suspension of a custodial sentence.

9 40. I also find that the learned Magistrate took into account all the mitigating factors,
10 including the fact that the Appellant was of good character, and that her purported
11 aim was to visit her granddaughter. I accept that in her reasons for sentencing, the
12 learned Magistrate did not refer to the medical condition of the Appellant’s
13 husband, nevertheless, the Court notes that the learned Magistrate recorded the
14 advice given by counsel for the Appellant to the Court that the Appellant’s husband
15 had to return to the Philippines as a result of serious medical condition. The learned
16 Magistrate also recorded that she had been advised that the Appellant’s husband
17 had received the necessary medical treatment and was soon to be released from
18 hospital.

19 41. In addition, the learned Magistrate stated:

20 *“The Court has some sympathy for the future that awaits [the Defendant],*
21 *nevertheless, the Defendant’s circumstances are not so unusual or exceptional*
22 *to justify suspending a custodial sentence.”*



1 42. It is clear to me that the learned Magistrate gave the submissions of counsel for the
2 Appellant very serious consideration before sentencing the Appellant to a total of
3 74 days. I agree with the learned Magistrate's finding that the Appellant's
4 circumstances - including having a husband in the Philippines who is convalescing
5 after major surgery – do not constitute exceptional circumstances to justify not
6 imposing an immediate custodial sentence.

7 43. I find that a considerable amount of preparation went into creating the irregular
8 passport. Although the Appellant maintains that her reason for visiting the Cayman
9 Islands was to see her daughter and her granddaughter, great care and planning
10 were put into preparing the applications for the temporary work permit and the 12-
11 month work permit. These are serious offences and involved deceit at different
12 times and for more than one application.

13 44. Although the authorities demonstrate that the Courts of the United Kingdom
14 consider a false passport more seriously than an irregular passport, both include an
15 element of deception. The holder of a false passport and the holder of an irregular
16 passport are both falsely holding themselves out to be someone they are not, with
17 the sole purpose of deceiving the authorities as to their true identities.

18 45. This Court agrees with and endorses the learned Magistrate's statement:

19 *“A deterrent sentence must be appropriate to send a strong message to others*
20 *that offences of this type will not be tolerated.”*

21 46. I also agree with the learned Magistrate's decision to impose an immediate
22 custodial sentence. I find that her sentences on all four counts cannot be described
23 as disproportionately harsh, unfair or unjust. Accordingly, I find that the sentences



1 imposed by the learned Magistrate, in relation to the four separate counts, as well as
2 the total of 74 days' imprisonment, are not manifestly excessive, or wrong in
3 principle.

4 47. Accordingly, for the above reasons I dismiss the Appeal and uphold the decision of
5 the learned Magistrate.

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8 **Dated this the 11th December 2012**

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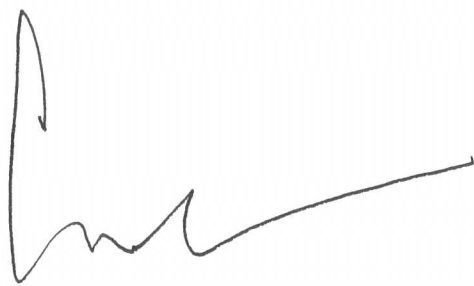
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15 **Honourable Mr. Justice Charles Quin**
16 **Judge of the Grand Court**