IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CACR018/2012
Criminal Appeal No. 18 of 2012
(Indictment No. 0048/2010)
C#04325/2010

BETWEEN: **THE QUEEN** **RESPONDENT**

and

ERICK MICHAEL ADAM **APPELLANT**

Before:

The Right Honourable Sir John Chadwick, President
The Honorable Elliott Mottley, Justice of Appeal
The Right Honorable Sir Anthony Campbell, Justice of Appeal

Appearances: Mr Richard Barton for the Appellant.
Ms Toyin Salako - Crown Counsel for the Director of Public Prosecutions.

Hearing: 12 November 2013
Judgment: 21 November 2013
Reasons released: 23 January 2015

Elliott Mottley, Justice of Appeal

Following a trial before Quin J and a jury, the Appellant was convicted of two offences. The first offence alleged that the Appellant on 14 September 2009 stole the sum of

US$29,987.33 the property of Kevin Barcant. The second offence was false accounting in which it was alleged that, also on 14 September 2009, he dishonestly and with a view to gain for himself, falsified a document used for accounting purposes, via a Term Deposit Letter of Instruction by falsifying the customer's signature.

1. On 13 June 2012, the Appellant was sentenced to 2 years and 6 months imprisonment on count 1. On count 2 he was sentenced to 12 months imprisonment which was to run concurrent to the sentence imposed on count 1. In addition, the Appellant was ordered to reimburse RBC in the sum of US$29,987.33. This money was to be paid in full, 3 months after the end of his term of imprisonment.

2. The Appellant sought leave of the Court to appeal against his conviction on the following ground:

    i. A misdirection of law by the learned Judge in that he failed to direct the jury as to how they should consider the circumstantial evidence in the case;

    ii. A misdirection of law by the learned Judge in that he failed to direct the jury that the evidence provided for examination by the Crown's handwriting expert was insufficient for proper comparison of the known and questioned documents;

    iii. A misdirection of law by the learned Judge in that he failed to warn the jury that the proper approach with regard to the expert evidence relied upon by the Crown was to consider the expert's conclusion in respect of each individual exhibit and that they should not aggregate his findings so as to support one another.

    The Appellant also sought leave to appeal against the compensation order on the following grounds:

i. The Appellant's financial resources are extremely limited;

ii. His prospects of meeting such an order within the timeframe allowed or the foreseeable future are unrealistic and therefore remote.

3. The prosecution's case was that Erick Adam was employed by Royal Bank of Canada (RBC) for at least three years. By September 2009, he was a Personal Financial Services Representative (PFSR). Kevin Barcant was a customer of RBC since 1982 where he had a term deposit for his wife and his five adult children. The only person with signing authority was Kevin Barcant. The Appellant had been assigned to the Barcant account which was part of his portfolio of client accounts. The Barcant account had been inactive for many years. It was last updated on 7 February 2008. This was done by the Appellant who had access to all the information concerning this account. The Appellant forged the name of Mr. Barcant's daughter Heidi Barcant, on a letter of instruction which he then used to break the term deposit and release the funds in the term deposit. The amount of the deposit was US$29,987.33. Cash in this amount was subsequently handed to the Appellant. Some of the banking procedures governing such transactions were not strictly followed. Heidi Barcant, now Heidi Knaggs, had not called herself "Barcant" for over 21 years, and was not in the Cayman Islands on the relevant dates.

On 25 September 2009 the account holder, Mr. Barcant, came to the bank to have discussion about his account; it was then discovered that the account had been closed. The Appellant was asked for the file but it was never found. Not only was the client's original file not found; the file the Appellant said he had created eleven (11) days earlier, on 14 September 2009, could not be found. The Appellant alleged that someone claiming to be Heidi Barcant came to him and closed the Term Deposit. It was on this file that the

Appellant said that he placed a copy of the (i) information relating to the term deposit, (ii) Heidi Barcant's personal information form, and (iii) a copy of the bank draft for the proceeds of the term deposit.

4. In his evidence, the Appellant accepted that on 14 September 2009 he completed a number of forms which led to a draft being prepared and which was handed over to two individuals or at least one individual in particular. He admitted that he let the money go out of the bank. When interviewed on 2 October 2009 he told the investigating officer that he accepted that he did the transactions that led to the money leaving the bank. He explained that, on 14 September 2009, he looked for the Barcant file. He agreed that on the 14 September 2009 he took an ID from Heidi Barcant, looked at it, but did not photocopy it. He accepted this was his mistake in that he did not follow the established procedure. Since the file was old, the customer was required to update the file; to this end, he requested Heidi Barcant to fill out a Personal Information Sheet which he placed on the file which he created on 14 September 2009. A copy of the term deposit, her original personal information form and a copy of the draft were placed on the file which was left in the vault. He agreed that on 25 September 2009, when Mr. Barcant and his wife came to the bank, he could not find the new file which he had created. He spent 3 weeks trying to locate the file but was unsuccessful. The Appellant said he gave a description of the persons who came into the bank on 14 September 2009. He suggested that the tape from the bank's security cameras should be viewed. However, it was discovered that the cameras were not working on 14 September 2009. He accepted that he did not get the required authorization in order to break the deposit. He agreed that it was he who took the bank draft to the client to get it signed and it was he who took it to

the teller to have it cashed. He stated that he was not aware that he had to write the ID number of the customer on the back of the draft. He accepted that, in order to complete the transaction after receiving the draft, he stood in line like a normal customer. The Appellant confirmed that his cash limit was $10,000.00. The Appellant had been informed that he had to fill out the Large Cash Transaction Sheet since the amount involved in the transaction was over $10,000.00. The client filled out the sheet. The Appellant said he gave the Large Cash Transaction Sheet to a supervisor who had to initial it before it went to compliance section. After he received the cash, he took it back to his office and counted the money in the presence of the customers. He denied that he took the CI$16,400.00 and the over US$ 9,000.00 and kept it for himself. He was adamant that he gave the money to the person he said was Heidi Barcant. He denied falsifying the bank documents which enabled him to obtain the cash money. He also denied that the five signatures, on the documents, alleged to be forged were his signatures or that the documents were signed by him. He specifically denied falsifying the documents and inventing the couple who he said visited the bank on 14 September 2009.

5. In cross examination, the Appellant accepted that when a term deposit was being broken it would be normal procedure for the money to be transferred into the customer's bank account or that the customer be given the money by draft or that the customer would give instructions to have the money wired to another account. In respect to the bank's policy of discouraging customers from taking large amounts of cash from the bank, he stated that on 14 September he did not discourage the people who he said came into the bank from taking a large sum of cash. He accepted that he did not take the customer with him to get the cash, but said that he had asked the Supervisor whether she wanted him to bring

the clients in front of her so that she could ask them what the cash was being used for. He agreed that the sheet kept by the Bank for signature by customers does not have a signature for Heidi Barcant indicating that she visited the Appellant on 14 September 2009. The Appellant however pointed out that the Manager of Customer Service Operation had said that the sign in sheet was not always signed by customers. To a suggestion that he offered to repay the bank because it was he who took the money, the Appellant responded he offered to repay the money because he made an error and as such was willing to repay the Bank. He considered that anybody in their right mind would have done the same thing in order to avoid being charged. When asked by the Crown who filled out the personal information form, the Appellant replied that he left Ms. Barcant in the office filling it out. The Appellant said that he filled in the customer's name in the Letter of Instruction. He explained that, as it was a new form with which the client was not familiar, he got the information from the client, filled it out and made the client sign it.

6. In Ground 1, it was alleged that the judge failed to direct the jury as to how they should consider the circumstantial evidence. Mr. Barton, Counsel for the Appellant, complained that the jury was not given sufficient assistance with regards to the care to be taken before they could draw adverse inferences against the Appellant from the circumstantial evidence. He submitted that there was a real danger that the jury would have approached their task by identifying the only direct evidence in the case, the allegation by the Crown that the Appellant was the person who wrote the questioned writing, and concentrate upon it exclusively without the assistance of knowing its possible shortfall. He contended that in such circumstances the conviction was not safe.

7. Ms Salako, Crown Counsel who like Mr. Barton, did not appear at the trial, conceded that the judge did not give a direction on circumstantial evidence as set out in the Judicial Studies Board of England and Wales Crown Court Bench Book. She pointed out at the commencement of his Summation Quin J told the jury:

> You are entitled to draw inferences, that is, come to common sense conclusions, based on the evidence you accept. For example, if we are all in a house and we see somebody come in through the front door soaking wet, with an umbrella, although we have not been outside, we can draw the inference that it is raining outside. This is an example of how we use our commonsense. That is the strength of the Jury system: You bring to bear your experiences of life and people to your deliberations.

8. Mr. Barton submitted that, in the course of the investigation by RBC and the subsequent investigation, a number of matters were discovered. He listed these matters as:

    i. That the original file could not be found;
    ii. That the Appellant had been the account officer who last updated the account on 7 February 2008;
    iii. That the file the Appellant claimed to have created on 14 September 2009 could not be found;
    iv. That the CCTV for RBC:
        a. On 14 September 2009 was unavailable; and
        b. That the Appellant was informed of this fact on 25 September 2009;

v. That no other member of staff recalled seeing the male and female that the Appellant claimed visited RBC on 14 September 2009;

vi. That the Appellant, when he dealt with this transaction, had breached a number of RBC's protocols and procedures which included:

a. Failing to obtain authorization from his personal supervisor for the transaction to proceed;

b. Failing to endorse the identification document number on the rear of the draft;

c. Failing to copy the female's identification;

d. Dealing with a transaction in excess of his cash limit, US$10,000.00; and

e. Not discouraging the taking of the proceeds in cash;

vii. Additionally the Crown relied upon the following features of the case:

a. The Appellant had offered to pay back the cash to his employers;

b. The Appellant had variously stated that he either couldn't identify the male and female or had given a limited description;

c. The Appellant's girlfriend had at the material time of the offence bought an expensive motor vehicle.

He submitted that these matters amounted to no more than circumstantial evidence. He argued that in this case there was a real possibility that the significance of these matters listed above were increased by the inappropriate weight given to the conclusion of the handwriting expert.

9. Counsel pointed out that the judge recited what each witness said in evidence but did not give any direction in respect of circumstantial evidence. He argued that the proper course

would have been to outline the significance of the evidence individually and collectively as claimed by the prosecution and then to summarize the response of the defence. He submitted that the judge failed to assist the jury and consequently did not warn them that they must examine with care the claim made by the prosecution. He contended that the judge should not have directed the jury to consider the matters revealed in cross-examination which he said may have weakened the Crown's claim that it was an inescapable conclusion that he Appellant was guilty.

Miss Salako however indicated that the judge had correctly identified and reminded the jury of the prominent aspects of the evidence.

10. At the end of the case, and before the summation commenced, the judge in the absence of the jury discussed with both prosecution and defence counsel whether there were any specific directions which they wished him to give the jury. The Record does not reveal that it was thought necessary to give any specific direction on circumstantial evidence over and above what was eventually given in respect of inference.

11. In light of this discussion, the judge did not give the direction dealing with circumstantial evidence. In this context it is necessary to have regard to what was stated by Lord Morris of Borth-y-Gest in *McGreevy v DPP* [1973] 1WRL 276, [1973] 57 Cr App R 424. His Lordship said:

> "The particular form and style of a summing-up, provided it contains what must on any view be certain essential elements, must depend not only upon the particular features of a particular case, but also upon the view formed by a Judge as to the form and style that will be fair and reasonable and helpful. The solemn

function of those concerned in a criminal trial is to clear the innocent and to convict the guilty. It is, however, not for the Judge but for the jury to decide what evidence is to be accepted and what conclusion should be drawn from it. It is not to be assumed that members of a jury will abandon their reasoning powers and, having decided that they accept as true some particular pieces of evidence, will not proceed further to consider whether the effect of that piece of evidence is to point to guilt or is neutral or is to point to innocence. Nor is it to be assumed that in the process of weighing up a great many separate pieces of evidence they will forget the fundamental direction, if carefully given to them, that they must not convict unless they are satisfied that guilt has been proved and has been proved beyond all reasonable doubt."

12. The prosecution built their case on two separate planks. The first plank was that Heidi Barcant did not visit the RBC on 14 September 2009. The second plank was that, in the absence of such a visit, it was the Appellant who forged the signature on the various bank documents and who received and kept the proceeds of the forged documents.

13. On the state of the evidence, the first issue which the jury had to determine was whether Heidi Barcant visited the bank on 14 September 2009 and met with the Appellant and gave him instructions in relation to the Term Deposit. If the jury came to the conclusion that she did visit the bank then almost certainly the second plank of the prosecution's case would fall away. However, if the jury came to the conclusion that she did not visit the bank then they would have to go on to consider the other evidence relating to the second plank which is who forged the documents.

14. As previously indicated, the first issue therefore which the jury had to determine was whether Heidi Barcant visited the bank on 14 September 2009. This was a question of fact which the jury had to determine. It required the jury to consider the evidence of the Appellant who stated that Heidi Barcant did in fact come to the bank. On the other hand, the jury had to consider other evidence which was not direct evidence but came from the other circumstances of the case. It was from these circumstances that the prosecution was asking the jury to find that the Appellant was not speaking the truth when he said that Heidi Barcant visited the bank. These are the circumstances referred to above but require repeating if only in note form. These include (i) Heidi Barcant was married in 1989 and has since that date used the surname of Knaggs (ii) the original file opened in 1983 could not be found (iii) the Appellant did not copy the identification allegedly provided by Heidi Barcant (iv) no record of the identification which was used for the completion of the transaction existed (v) the Appellant did not obtain the signature of his supervisor for the Term Deposit Letter of Instrument to break the deposit (vi) all the transactions relating to this particular transaction had been completed by the Appellant (vii) the proceeds of the transaction, which he alleged he counted in the presence of Heidi Barcant, was handed to the Appellant in cash in the office which was a breach of the bank's policy that staff were not permitted to handle cash in their office (viii) the Appellant was aware that as a Personal Financial Service Representative he was not authorized to sign and negotiate cheques or cash for transactions over $10,000.00 (ix) he was not authorized to break a Term Deposit (x) on 25 November 2009 in the presence of his father the Appellant told the police he would pay back the US$29,987.33 (xi) the Appellant was the only person said to have seen Heidi Barcant sign the five documents.

15. The judge was required to bring these factors to the attention of the jury and to deal with the explanations, if any, which the Appellant offered. In explaining why he did not follow the procedure laid down by the bank, the Appellant admitted that he made a serious mistake by not checking with his personal supervisor before departing from those procedures. He also accepted that he made a mistake in not making a copy of the Identification Card belonging to Heidi Barcant. He explained, and accepted, that he made an error in not following the procedure established by the bank and in the circumstances he was willing to repay the bank rather than be charged.

16. While the judge did not, in terms, leave to the jury the explanations offered by the Appellant in the manner stated above, he nevertheless reminded the jury of what the Appellant said in his evidence. While it might have been more helpful to the jury if he had dealt with the issue of circumstantial evidence in the manner suggested, the jury would not have been left in any doubt as to what the issues were in relation to the question whether Heidi Barcant visited the bank on 14 September, 2009 and broke the term deposit.

17. In our view, the jury ought to have been told that, once they came to the conclusion that Heidi Barcant did not visit the bank on 14 September 2009, they should go on to consider the other plank of the prosecution's case which was that the Appellant was the person who wrote the suspected handwriting. The jury ought to have been reminded that, if they came to the conclusion that Heidi Barcant did not visit the bank, they could not conclude, by that finding alone, that it must have been the Appellant who was the author of the questioned handwriting. This issue of the questioned handwriting had to be determined on the evidence, especially that of the expert, Mr. Norwich.

18. In Ground 2, the Appellant complained that the judge misdirected the jury by failing to direct them that evidence provided by the Crown to its handwriting expert was insufficient for him to have conducted a proper comparison of the known and questioned or suspected documents. The failure of the judge to adopt this approach, in our view, did not render the verdict unsafe. The jury was made aware that the burden was on the prosecution to prove that the appellant was the person who forged the signature and received the money and that before they could find the appellant guilty, they had to be satisfied beyond reasonable doubt that the appellant was the person who forged the signature and obtained the money.

19. The Crown relied on the evidence of Mr. Norwich who has been a Forensic Document Examiner since 1979. He has acted as an expert in approximately 10,000 to 12,000 cases.

20. Mr. Norwich was required to examine five questioned documents which had been submitted to him for examination. These were produced in evidence as Exhibits and were given the exhibit numbers as set out below:

    - Exhibit 8 – Original voucher for US$ 29,987.33;
    - Exhibit 3 – Machine copy of the Deposit Letter of Instruction;
    - Exhibit 6 – Original banker's draft adated14 September 2009;
    - Exhibit 7 – Original cash paid out slips;
    - Exhibit 2 – Credit copy of the banker's draft dated 14 September 2009.

21. Mr. Norwich was given nine machine copied documents bearing the signature of the Appellant together with the five questioned documents. He stated that he was given copies of nine documents bearing the known signature of the Appellant. These documents were to be used by him for comparison purposes.

22. In relation to the original voucher for US$29,987.33, Exhibit 8, the witness stated that there were two different writings. He expressed the opinion that it was highly probable that the underlying signature was written by the Appellant. This opinion was based on an "over abundance of similarities between the underlying signature and the known signature of the Appellant."

23. In respect to Exhibit 3, the Machine copy of the Term Deposit Letter of Instruction, Mr. Norwich stated that, in his opinion, the signature on this document was probably written by the Appellant. He explained that his opinion was based on "some patent similarities between the portions of that signature and the known signatures."

24. The signature on Exhibit 6, the Original Banker's Draft dated 14 September 2009 could, in the expert's opinion, have been written by the Appellant. In relation to Exhibit 7, the original cash payment and slip, Mr. Norwich concluded that the signature on the document could have been written by the Appellant. Finally, in respect to Exhibit 2, Credit copy of the Banker's Draft dated 14 September 2009, he expressed the view that the signature could have been written by the Applicant.

25. Counsel for the Appellant in his Written Skeleton Argument conceded that it was permissible for an expert to compare genuine and admitted writings with a photocopy of the disputed writing where the disputed writing has been lost and to express an opinion on the author of the document. However, counsel contended that a photocopy will rarely, if ever, reveal pressure marks, tracing, overwritten words, pen lifts and other signs used to identify or eliminate the possibility of forgery. Mr. Barton appeared to be relying on the argument of counsel for the defendant in *Lockheed-Arabic v Owen* [1993] Q.B. 806.

However, in his judgment Mann L.J., at p814, acknowledged "the force of those points" but observed that "they relate to the credibility of an opinion". The Lord Justice went out to indicate that these matters "are not persuasive against admissibility." Mann L.J. observed:

> "It is unclear whether counsel was critisising the judge for admitting the evidence relating to the copies of the documents. The legislative language can accommodate an expression of opinions based upon a facsimile of a disputed writing and I think there is no reason why the court should hold such an opinion to be inadmissible. An ongoing statute ought to be read so as to accommodate technological change."

Mann L.J. later stated:

> "The opinion evidence is in my view admissible, but the judge will have to decided upon its cogency."

Ralph Gibson L.J. at p.815, observed that the signature produced in the photocopy of the cheque was "a disputed writing" and therefore the weight to be attached to evidence based on the photocopy was a matter for the judge. It should be remembered that *Lockhead-Arabic v Owen* was a civil case in which the judge was required to assess the weight of the evidence.

26. At the trial, counsel who appeared for the Appellant did not object to Mr. Norwich giving evidence of his comparison between the known handwriting of the Appellant which was in the copy of the document and the suspected handwriting. Counsel not having done so,

it is not open to Mr. Barton to raise on appeal the issue of the use of photocopies of documents containing the known handwriting of the Appellant for comparison purposes.

27. Mr. Barton complained that the direction of the judge on this issue was nothing more than a recital of the evidence given by Mr. Norwich. He contended that the judge did not do anything to assist the jury as regards to the unavailability of original documents for the inspection of the expert and how they should approach the issue of unavailability of those documents.

28. Mr. Barton was in fact suggesting that the judge did not direct the jury that they had to consider what weight had to be given to the evidence of Mr. Norwich in circumstances where he did not use an original signature of the Appellant but a copy for the purposes of comparing his known signature with the disputed signature.

29. While the judge did not direct the jury in this manner, the jury could not have been left in doubt that it was for them to say what weight was to be given to the evidence and that they had to be satisfied beyond reasonable doubt of the guilt of the Appellant before they could return a verdict of guilty.

30. The jury would not have been left in any doubt as to their role in considering the evidence of the witnesses in the case. Early in his summation, the judge told the jury of their role when considering the evidence in the case and what was required of them before they could come to a conclusion that the Appellant was guilty. The judge told the jury:

> "In a criminal trial the burden of proving the guilt of the Defendant is on the prosecution. This is a cardinal principle under our law. But how does the

prosecution succeed in proving that the Defendant is guilty? The Prosecution must prove the case against the Defendant beyond all reasonable doubt, that is, the prosecution must prove the case to make sure that the Defendant is guilty. Nothing less than that will do. If after considering all the evidence you are sure that the Defendant is guilty, you must return a verdict of guilty, If you are not sure, your verdict must be not guilty."

31. The jury could not be left in any doubt that, as part of their function in determining the guilt of the Appellant, they had to be sure that the Appellant had written, not only the known signature in the copies of the documents, but also the disputed signatures. This was indeed the main issue in this case. The observations of Lord Morris in *McGreevy v DPP* (supra) are apposite. His Lordship said:

> "It is not to be assumed that members of the jury will abandon their reasoning powers and, having decided that they accept as true some particular piece of evidence, will not proceed further to consider whether the effect of that piece of evidence is to point to guilt or is neutral or is to point to innocence."

As stated earlier, there was no objection to the admissibility of the evidence used for comparison. It was not necessary (in the opinion of the Court), in the circumstances of this case for a direction to the jury in the manner suggested by counsel for the Appellant. The jury were aware that they had to determine whether the Appellant was the author of the suspected documents and in considering this they had to weigh the evidence of Mr. Norwich and determine whether they accepted it.

32. Mr. Barton further complained that the judge failed to warn the jury that the proper approach with regard to the expert evidence was to consider the expert's conclusion in respect of each individual exhibit and that they should not aggregate his findings so as to conclude that they supported one another. The last question asked by Crown Counsel was whether Mr. Norwich was able to conduct a comparison of the five questioned signature to ascertain whether they were written by the same person. The expert responded:-

> "Well, understand that each one of the questioned signatures is examined by itself against the known signature, I don't compare all the question signatures to each other. As part of a thorough examination, however, you can't help but notice that there are similarities between all five and I certainly noted that as well."

33. The Court agrees with the submission of Ms Solako that there was never any suggestion that the jury should look at the questioned documents together. Each of the questioned documents was dealt with by Mr. Norwich separately and each was exhibited separately. Indeed, his evidence was that he did not compare the questioned signatures to each other. There was no danger of the jury aggregating the findings of Mr. Norwich in respect of each exhibit in view of the evidence that he did not compare the questioned signatures with each other. We do not consider that there was any substance in this ground of appeal.

34. For the reasons stated above, this Court refused leave to appeal against conviction.

35. As regards to the sentence imposed, the Appellant seeks leave to appeal against his sentence insofar as the Appellant was ordered by the court to reimburse Royal Bank of Canada in the sum of US$29,987.33. The Appellant was sentenced to a term of

imprisonment of two years and six months on the first count of theft and, on the second count, to 12 months imprisonment to run concurrently with the sentence of the first count. In addition, the Appellant was ordered to reimburse Royal Bank of Canada in the sum of US$29,987.33 or in default to serve a term of imprisonment.

36. The Appellant sought leave to appeal against the order for payment of compensation on the ground that the Appellant's financial resources are extremely limited and his prospects of meeting the order for payment within the three months of being released from prison are virtually nonexistent.

37. During his mitigation, counsel who appeared below informed Quin J that, during his interview, the Appellant stated that while he did not admit that he stole the money, he was prepared to repay the bank the money which he had lost. As the bank had paid the customer, it was the bank who had suffered the loss. Counsel told the judge:

> "So when it came down to any question of compensation; he is somebody who is not going to say, well, I'll need time to look for a job when I come out and so forth. He is in a position to say I have a job, I will have a job. I can start making compensation and I ask you to bear in mind because it does indicate the way in which Adam has developed, sir, that somebody who is …who he does work for has placed that degree of trust in him that he is prepared to say…even though he knows of this situation, that he is prepared to take him on and to employ him when released."

38. In his Affidavit of Means, the Appellant stated that he was employed by Cayman Gourmet Food Ltd. He is employed as a Delivery Driver and his salary is stated as C.I. $3000.00. His monthly expenses are $1150.00.

39. During the course of his Sentence Remarks, Quin J said that

> "…although the bank had reimbursed its client, the Defence does not object to a compensation order for reimbursement to be made to the bank in question."

Later in the Remarks, the judge observed that when the Appellant completed his time in prison, he was in the fortunate position of having immediate employment. It was in this context that the judge made the order that the Appellant reimburse the Royal Bank of Canada in the sum of US$29,987.33 or in default serve a term of imprisonment.

40. In *Randall v The Queen [2002] 2 Cr App R11; [2002] 1WLR 223.7, [220] UKPC19,* Lord Bingham of Cornhill observed at para 33

> "The Appellant's complaint against sentence is that a compensation order should not have been made without an inquiry into the means available to him to pay such an order. In making this complaint the Appellant is able to rely on a well established principle of sentencing. Where a consecutive sentence is imposed on default of payment, it is intrinsically unfair to make an order which may result in the imprisonment of an offender when he lacks the means to avoid."

41. Crown Counsel has submitted that during the mitigation the Appellant's counsel reminded the court that the Appellant had offered to repay the money. It was pointed out that the offer to repay was still being made. Crown Counsel argued that such a

submission in mitigation could only be advanced upon instructions. In the circumstance, it is submitted that the learned judge was not required to conduct an enquiry into the Appellant's financial means.

42. The provision relating to the making of compensation orders is found in S.33 of the *Penal Code* (2012 Revision). It reads as follows:

> "Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence or by any other similar offences committed by him which are taken into consideration by the court in determining sentence. Any such compensation may be in addition to or in substitution for any other punishment."

43. From this it is clear that the compensation order is part of the punishment to be imposed on a convicted person. The ability of the Defendant to pay the compensation order is a relevant fact which the court has to take into consideration when making the order. If a Defendant does not have the means to pay the compensation order within the time stipulated by the Court, it would be unjust, in the opinion of the Court, for him to undergo a further period of incarceration for making default in payment of the compensation. This could not have been the intention of the Legislature. The Defendant would have been sentenced in accordance to accepted principles of sentencing. The imposition of a further term of imprisonment on a Defendant who does not have the means to pay the compensation order would result in the sentence being increased, in breach of the principle of sentencing,

44. The Appellant had early in the investigation offered to repay the money. At time of sentence, the judge considered that the Appellant was lucky to have immediate employment on his release from prison. However, it does appear that the judge did not pay sufficient attention to what the level of his earnings in his new employment would be; given that the circumstances of the Appellant had changed after his sentence.

45. Although the Appellant had indicated that he would have been in a position to pay the compensation within three months, he did not in fact possess the means to make the re-payment within the time limited by the court. The effect of this is that the Appellant, having served his sentence of imprisonment, would likely have to return to prison to serve the time stated in the default provisions of the order. We consider that this would operate as an additional term of imprisonment and would be wrong in principle. We granted the Appellant leave to appeal against the compensation order; but this is limited to seeking reconsideration of the time within which the compensation must be paid. The matter is to be returned to the judge for him to consider any application which the Appellant may wish to make in relation to extending the time for paying the compensation. The order was suspended to allow the Appellant to make the application. We consider that the question of an extension should be dealt with by the judge and not by this Court as it may involve taking additional evidence as to his circumstances.

Chadwick P

Mottley J.A.

Campbell J.A.