CAYMAN ISLANDS
CRIMINAL FORM 18
RULE 50(1) & 51(1)

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal No. 38 of 2010
(Summary Court Appeal No.48/08)
C#8789/07(1-3)

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

MARLENE BOVELL-SWANSON

Appellant

NOTIFICATION TO AUTHORITIES OF RESULT OF APPEAL

To: The Attorney General

This is to give you notice that **MARLENE BOVELL-SWANSON** having appealed against a ruling of the Grand Court dated the 5th November 2010 which dismissed her appeal from conviction and against the ruling 14th day of December 2010 which dismissed her appeal against sentence and made a compensation order for $6,000.00 or 1 day in default.

The convictions and sentences originally passed upon *her* by the Summary Court on the **10th** day of **December, 2008** were as set out below :

C#8789/2007(1) Theft
21 months imprisonment
C#8789/2007(2) Theft
21 months imprisonment, concurrent.
C#8789/2007(3) Theft
21 months imprisonment, concurrent.

The Court of Appeal has finally determined the said appeal, and has this 14th day of April 2011 given judgment therein to the effect following:

1. **Appeal against conviction dismissed.**
2. **Leave to appeal out of time against sentence refused.**
3. **Reasons to be put into writing.**
4. **Conviction and sentence affirmed. Time spent in custody to be taken into account.**

Dated this 31st day of May 2011

Registrar

COURT OF APPEAL
CAYMAN ISLANDS

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Criminal Appeal No. 38 of 2010
(SCA No.48/08)
C#8789/07(1-3)

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

MARLENE BOVELL-SWANSON

Appellant

Before: **The Rt. Hon. Sir John Chadwick, President**
The Hon. Mr. Justice I. Forte, JA
The Rt. Hon. Sir Anthony Campbell, JA

Appearances: Mr. Anthony Akiwumi of Stuarts Walker Hersant for the Appellant. Mr. John Masters for the Crown

Heard and Judgment delivered: **14th April 2011**
Reasons released: **31st May 2011**

JUDGMENT

1. This is an appeal from the dismissal of Henderson J. of an appeal from the Summary Court in which the appellant was convicted on three charges of theft.

2. She was charged on each count for theft contrary to Sec. 235(1) of the Penal code (2006 Revision), the first alleging that the appellant on or about the 31st October 2006, stole $2,500 from the Cayman Islands Crisis Centre (CICC) by writing a CICC cheque for that amount in her maiden name, and subsequently cashing it. The other two counts

charged the same offence, committed on different dates and relating to different amounts. She was convicted on each count by the Chief Magistrate, Her Honour Judge Ramsay-Hale, and sentenced to 21 months imprisonment on each, to run concurrently.

3. The appellant thereafter, appealed to the Grand Court. That appeal came on for hearing before Henderson J. (sitting as an appellate Judge) in the Grand Court on the 10th December 2009.

4. In that appeal, the appellant challenged the Chief Magistrate's decision on both law and fact. She complained that the Chief Magistrate erred in law in the following respects:

(i) In deciding to allow the Crown to amend the charges at the close of its case and following a submission of no case to answer;

(ii) in deciding to allow the Crown to call further evidence after it had closed its case and after a submission of no case to answer; and

(iii) in rejecting a further submission (at the conclusion of the Defence case) that the charges of theft had not been made out and that the Crown's case was one of obtaining by deception rather than theft.

5. In the course of his judgment on that appeal, having referred to the fact, that though the Crown was invited to apply for the charges to be amended, there was no evidence of any such application having been made, the learned judge concluded that:

> "In summary, the defendant has been convicted and imprisoned on three 'amended' charges in circumstances when the Crown never requested an amendment, the amendment has not been reduced to writing, and the defendant was not re-arraigned, in contravention of the mandatory requirements of Sec. 74."

6. He allowed the Appeal concluding that there was no justification for a failure to follow the mandatory process of re-arraignment required by Sec. 74 of the Criminal Procedure Code, and that given that irregularity, the convictions could not stand. He ordered a re-trial on all three charges.

7. The Attorney General filed a Notice of appeal from that judgment of Henderson, J. on the 15th March 2010. The grounds of appeal included the following:

> "The Learned Judge erred in law by holding that there was a breach of Sec. 74(1) *Criminal Procedure Code (2006 Revision)*

8. This Court allowed the appeal on 16th August 2010 and remitted the matter to Henderson, J. for further determination of the defendant's appeal on grounds which were before him. He dismissed that appeal.

9. This now is an appeal from the judgment of Henderson, J. which dealt with the grounds of appeal which this Court remitted to him for consideration, and which he had omitted to deal with in the original appeal which was before him on the 10th December 2009.

10. **THE FACTS**

The appellant, formerly worked on the night shift at the CICC, but when the Executive director left that post in July 2006, she (the appellant), was appointed Acting Executive director. Although she did not have the authority to sign cheques on behalf of the Centre, it was customary for her to fill out the cheques and present them to a Board member for signature. The degree of trust the members had in her was such that they did not feel the need to question the cheques before signing them. The three cheques in question were made out by the appellant and made payable to "Ingrid Welsh", the maiden name of the appellant. Her maiden name was unknown to the Board members, including Mr. Lendell Layman, the Chairman. At trial, it was admitted by the appellant that she cashed the cheques and used the proceeds for her own purposes. It was the Crown's case that she was not authorized to do so.

11. The case for the defence was that three cheques were legitimate payments for consulting services, separate from her job as Acting Executive Director, and which had been agreed to by Mr. Layman.

12. At the end of the Crown's case, a submission of no case to answer was made. The defendant (appellant) contended that there was no evidence that the money appropriated was a chose-in-action that belonged to CICC as opposed to the property of the Bank in which it had its account. It was agreed that if the CICC's account was in credit, or there was an authorized overdraft within which the cheques could be honoured then it would be a chose-in-action which belonged to the CICC. However if the amount of the cheques could not be encashed for an amount within the authorized overdraft facility then it would be property which belonged to the Bank. The defence submitted that the three charges alleged that the amounts encashed by method of the three cheques belonged to the CICC, and there was no evidence that that was so.

13. In answer to these submissions the Crown maintained that these submissions were being made for the first time at the end of the Crown's case, and claimed that it was being "ambushed". The Magistrate indicated that she agreed with the submissions of the defence that there was a defect in the evidence. As a result, the Crown applied to re-open its case to call witnesses to rectify the defect. This application was granted, and the Crown was allowed to recall Mr. Layman the Chairman of the Board and to call an employee of the Bank. That evidence established that at the time each cheque was encashed the CICC's account was in credit.

14. In giving her reasons for doing so in a written judgment, some two and a half months later, the Learned Magistrate had this to say:

> "Having considered the submissions of Counsel and the authorities, I accepted Mr. Wilson's submission that the charges were defective for failing to state correctly what property belonging to CICC it was alleged that the defendant appropriated. His submission was plainly right in light of the decisions in Kohn and Williams. The CICC's credit balance was the only property of the CICC capable of being appropriated when the cheques were negotiated against the bank account, not money. I rejected his submission, however, that the Crown should not have leave to amend the defect in the charges and did so for the following reasons:

15. (i) The point taken was a formal one and not critical to the real issue to be determined by the Court, which was the defendants' entitlement to the payments made to her by cheque. The substantive issues to be tried were narrowed before the commencement of the trial. There was no issue between the parties that the defendant had negotiated cheques drawn on the CICC's bank account. The defence case was a positive assertion that the cheques were drawn to the defendant for services rendered to the CICC under a consultancy agreement.

(ii) As the defect was a technical one, there could be no prejudice to the defence in permitting the prosecution to amend the legal description of the property appropriated. Such an amendment would not change the essential thrust of the Crown's case nor put it on a different footing.

(iii) The defence had not been prejudiced in the way they put their case by the defect in the charge and there would be no unfairness to the defence in allowing the amendment as they would not have to meet a different case as a result. I invited the Crown to amend the charges".

16. There is no indication from the Record, that the charges were amended, and we have have been assured by Mr. Masters who appears for the Crown here and who also appeared for the Crown at the trial that these charges were never amended.

17. The Magistrate also revealed in her written judgment the reasons why she allowed the further evidence. She says: -

> "I turned next to a consideration of Mr. Wilson's second submission, that an evidential lacuna remained and there was no case to answer to the amended charges because the Crown had failed to establish on the evidence that there was a debt due to the CICC by the Bank which could be appropriated by the defendant.
>
> Again, I accepted Mr. Wilson's submission as correct. The CICC would have no enforceable right against the Bank if its account was in debit or if its overdraft facility were exceeded and Kohn is authority for holding that this is a matter the Crown must establish by the evidence. Again, however, I did not agree with his submission that the Court had no power to allow the Crown to call further evidence and allowed the Crown to re-open its case and recall Kyle McLean for the reason below:
>
> (i) Though I was, and remained satisfied that there was no intent to ambush the prosecution, the timing of the application was a special circumstance which permitted the Court to grant leave to the Crown to adduce further evidence to repair omissions in its case.
>
> (ii) The overall interests of justice require it as the prosecution 'should not fail through inefficiency, carelessness or oversight' (*Leeson*)
>
> (iii) There should be no prejudice to the defendant except to deprive her of a technical defence".

18. It is from that conviction of the appellant by the Magistrate that the appeal to Henderson, J. was made, which he ultimately dismissed, the matter having been remitted to him by this Court for further consideration.

19. **GROUND OF APPEAL**

Before us, Mr. Akiwumi for the appellant argued one ground of appeal. It reads: -

> "(i) The Learned Judge erred in law by failing to consider, properly or at all, the mandatory and terminating effect of Section 70 of the Criminal Procedure Code (2006 Revision)."

20. The appellant contends in the written submission of Counsel, enlarged upon before us that:

> "In the face of the clear and unambiguous language of the statute which gives an accused a right to an acquittal where a *prima facie* case has not been established by the Respondent, it is respectfully submitted that the codification of this right to an acquittal removes from the trial judge the discretion that she would ordinarily have had in the absence of section 70 of the CPC."

21. It should be noted that Section 70 falls under Part IV of the *Criminal Procedure Code* which deals with "Procedure in Trials before the Summary Court." It follows that that section deals with procedural matters.

The result for which the appellant contends (that is an acquittal), is predicated on the Magistrate's considering "that a *prima facie* case on the evidence presented had not been established."

22. A *prima facie* case is established, where the Crown presents sufficient evidence, which if accepted as fact would lead a reasonable jury to come to a conclusion of guilt.

23. It is in that context that the provisions of Section 70 of the *Criminal Procedure Code* should be interpreted. The section which deals with the procedure that should be followed in the Summary Court at the end of the case for the Crown states:

> "If at the close of the case for the prosecution (i) the court considers that subject to any fresh matter which might be revealed in the conduct of the defence, the prosecution has established a *prima facie* case the Court shall, if no defence is offered, convict the accused, but (ii) if the Court considers that a *prima facie* case on the evidence, presented has not been established and the accused offers no defence, or submits no case to answer, the Court shall acquit the accused.

24. In respect of (i) it must follow, given the standard of proof in criminal cases (i.e. proof beyond reasonable doubt), that in the absence of a defence being offered, the Magistrate would necessarily have to determine on the evidence presented by the prosecution, whether he/she is sure that the evidence offered is factual and satisfied the

required standard of proof before he/she could return a verdict of guilty.

25. In respect of (ii) (supra) if the Court is not satisfied that a *prima facie* case has been presented, then there should be no need to call upon the accused to present a defence to the charge. In that case, if the accused offers no evidence, or makes a no case submission in that regard, then the accused should be acquitted. This follows because if at the end of the Crown's case there is no evidence which if accepted, could result in a guilty verdict, then there would be no case for the accused to answer, and a "not guilty" verdict would follow.

26. This case turns on circumstances as described in (ii) above.

When the no case submission was made, the Learned Magistrate recognized that there was some defect in the evidence which for the reasons she gave, could be rectified by the calling of further evidence.

27. As there was no challenge before us, as to the circumstances, in which a court has the discretion to allow the re-opening of the Crown's case, after it has been closed, we say no more than that the case of the ***Regina v. Francis*** (1990) 1 WLR 1264 (Court of Appeal) clearly establishes the circumstances under which a Court may exercise such a discretion; and accordingly would find no fault with the Chief

Magistrate's exercise of such a discretion in this case, if not prohibited from doing so by Section 70.

28. Did the magistrate come to a conclusion that a *prima facie* case had not been established? There is no basis seen in the transcript to come to such a conclusion, though Mr. Akiwumi, contends that her agreement in respect to the defects in the evidence, impliedly shows that she thought there was not a prima facie case established. We disagree. The Magistrate, no doubt was analyzing the evidence to determine whether a prima facie case had been established. She was of the view, that in all the circumstances, and in the interest of fairness and of justice, the Crown should be allowed to re-open its case to rectify the defect. At that stage therefore, the whole of the Crown's case had not been presented (and the defence had not yet commenced) and consequently the Magistrate in allowing the further evidence, demonstrates that at that stage she had not yet determined whether a *prima facie* case had been established and postponed her decision on that issue, until she had heard the further evidence.

29. Section 70 implies in its provisions that the directions to acquit is conditional on the Magistrate coming to a conclusion that a *prima facie* case has not been established. In the instant case, that stage in the proceedings had not yet been reached, as the Magistrate permitted the

Crown to call further evidence, after which she obviously came to the conclusion that a *prima facie* case had been established.

30. In those circumstances, the provisions of Section 70 in so far as it directs an acquittal was not applicable.

31. It is for those reasons that we came to the conclusion that this appeal against conviction ought to be dismissed.

32. **SENTENCE**

The appellant also appeals the sentence of 21 months imprisonment on each charge to run concurrently. In dismissing the appeal, we indicated that we came to the conclusion that the sentence was not manifestly excessive.

33. The appellant was a person in whom the Board of the CICC laid its trust. The method by which the appellant appropriated the sum of money, involved an allegation of dishonesty in Mr. Layman the Chairman of the Board. She alleged that the cheques were made up, as a result of a clandestine arrangement between Mr. Layman and herself. This agreement she maintained allowed her to draw cheques to herself for payment of consulting fees payable to her in her maiden

name. This agreement was kept secret from the other members of the Board so as to avoid the incoming Executive Director from coming to a conclusion that the salary being offered to her would not be the same as the total sum being paid to the appellant.

34. This allegation which formed the basis of the defence was rejected by the Learned Chief Magistrate.

35. In the end, the appellant was not only a person in a position of trust who betrayed that trust, but in doing so attempted to smear the integrity of the Chairman of the Board.

36. In those circumstances, there is no basis upon which we could come to the conclusion that the sentence of 21 months on each charge, was manifestly excessive.

37. The appeal against sentence was therefore dismissed. Time spent in custody is to be taken into account.

Chadwick P

Forte JA

Campbell JA