

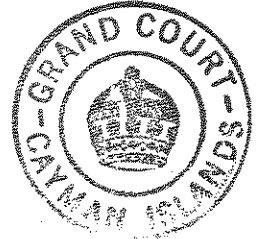
1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CRIMINAL SIDE**

3
4
5 **SCA No.: 10/14;**
6 **Case No.: 04914/2011**

7
8
9 **LAVANIA OLIVIA HUME-EBANKS**

10
11 **V**

12
13 **REGINA**



14
15
16 **Appearances:**

Mr. Crister Brady of BRADY, Attorneys-at-law

17
18
19 **Ms. Toyin Salako on behalf of the**
20 **Respondent/DPP**

21
22 **Before:**

The Hon. Mr. Justice Malcolm Swift (Actg.)

23 **Heard:**

23rd June 2015

24
25 **JUDGMENT ON APPEAL AGAINST SENTENCE**
26

- 27 1. On the 12th March 2014, in an impressive, detailed and carefully considered
28 judgment, the Learned Magistrate Kirsty-Ann Gunn convicted the Appellant of one
29 count of theft from her employer and 3 counts of false accounting. The total
30 amount involved was CI\$946.00 – all of which has been repaid by the Appellant.
- 31 2. The sentence imposed, and justified in a carefully reasoned sentencing ruling, was
32 16 weeks imprisonment concurrent on each count. The Appellant has been on bail
33 since sentence was imposed, pending resolution of the appeal against sentence. The
34 Appellant has properly not sought to appeal against her conviction.

1 3. The facts of the case are clearly set out in the Judgment of the Learned Magistrate
2 and will not be improved by repetition here. Stated shortly, the
3 Defendant/Appellant, in the course of her employment, stole cash received by her
4 from customers of the Cayman Islands Lands and Survey Department. She took
5 advantage of a chaotic system (if that is the right word) of cash accounting within
6 that Department. Part of the money was repaid at an early stage and all of it had
7 been repaid by the time of sentence.

8 4. The Learned Magistrate took into account in passing sentence all matters required
9 to be considered as explained in the judgment of the Court of Appeal in *R v*
10 *Barrick*¹:

11 (a) The Appellant's position in the hierarchy of the Department. It was at
12 the bottom end but nevertheless she was trusted to perform her work
13 honestly;

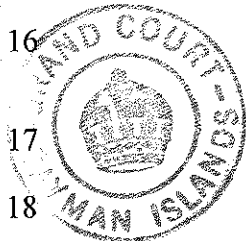
14 (b) The 7-month period over which the offences were committed;

15 (c) The absence of any evidence of the use to which the money stolen was
16 put;

17 (d) The limited impact of the thefts on the Department – save in relation to
18 the perception of employees that the cash accounting system was easily
19 abused;

20 (e) The impact of such offences on public confidence;

21 (f) The impact on the Appellant who was of previous good character;



¹ 1985 81 Cr App R 78

- 1 (g) The positive contents of the SIR;
- 2 (h) The Appellant's impressive character references; and
- 3 (i) Personal mitigation;

4 5. Although there has been some criticism of the weight attached by the Learned
5 Magistrate to some of the matters listed above, the real issue in this appeal is
6 whether an immediate custodial sentence was justified and, in particular, whether
7 the amount of money stolen is such that the court should properly have suspended
8 the sentence or imposed a non-custodial alternative. The Court in *Barrick*²
9 explained that, in general, an immediate custodial sentence:

10 *"... is inevitable save in very exceptional circumstances or where the amount of*
11 *money obtained is small"* (emphasis mine).

12

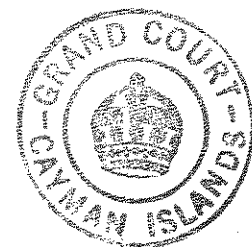
13 6. Clearly there were no exceptional circumstances in the present appeal so the first
14 issue is whether the amount stolen could properly be described as small.

15 7. Surprisingly there is a limited body of authority dealing with the issue of what
16 amounts to a 'small' sum of money for the purpose of avoiding an immediate
17 custodial sentence on the basis that "the amount of money obtained is small". In *R*
18 *v Clark*³, the Court of Appeal indicated that, in cases where the amount of money
19 stolen was "not small" but was still less than £17,500.00, the lowest range of
20 immediate custodial sentences fell between, very short, up to 21 months in length.

21

² (at P81)

³ 1998 2 Cr App R 137



1 That statement is entirely consistent with the imposition of non-custodial sentences
2 in cases involving small amounts of money but would suggest that a case in which
3 the sum stolen was not small, but was only just within the lowest range, merited a
4 very short immediate sentence.

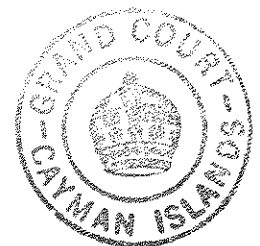
5 8. The sentence in the present appeal – one of 16 weeks’ duration – falls well towards
6 the bottom of the lower half of the lowest sentencing range as explained in *Clark*. I
7 fully appreciate that once a case is deemed to fall within the lowest range of
8 sentencing, there are other factors which may affect where exactly within that range
9 the immediate case sits. It is clear in the present case that the Learned Magistrate,
10 having decided that the amount stolen was not small, correctly took into account a
11 number of factors as explained in her Sentencing Ruling – as a result of which she
12 placed the case in the lower half of the lowest sentencing range and fixed the
13 sentence at one of 16 weeks. The question, therefore, is: Was the amount stolen in
14 fact ‘small’; if small, was an immediate sentence of imprisonment still called for;
15 and was the length of that sentence appropriate.

16 9. The Learned Magistrate placed no reliance upon the case of *Nicoletta v R*⁴ on the
17 basis that it was not clear whether the Court heard argument as to whether
18 \$1,240.00 was ‘small’ within the meaning of that term in the case of *Barrick*.

19 10. In my view it is clear that the Learned Judge⁵ was indeed deciding that the sum was
20 small within the meaning of that term in *Barrick*. The Learned Judge said in terms
21 of that case:
22

⁴ 1998 CILR 166

⁵ As he then was - now, the Learned Chief Justice.



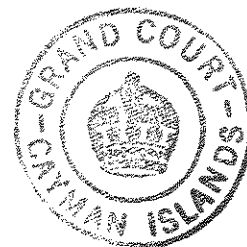
1 *“The offence involved what was, by any measure, a small amount of some*
2 *\$1,240. That brings the offence well within the exceptions recognized (in*
3 *Barrick) as not requiring immediate imprisonment although, involving a*
4 *breach of trust.”*

5
6 11. The case of *Clark* had been reported in The Times on the 4th December 1997 but
7 does not appear to have been drawn to the attention of the Judge when *Nicoletta*
8 was decided. *Clark* is certainly not listed in the list of cases referred to in argument
9 before the learned Judge. However I do not expect that the decision would have
10 been affected by the decision in *Clark*.

11 12. I am also not persuaded that the present appeal is affected by the well-known
12 decision of the Court of Appeal in this jurisdiction in *R v Scott; R v Fyne*⁶ - a case
13 which was dealing more with the effect of offences involving breach of trust (on a
14 rather larger scale than the present case) on the economy of these islands, rather
15 than with what amounts to a small sum for sentencing purposes.

16 13. I also take into account the *Chief Justice’s Statement of Tariffs and Guidelines on*
17 *Sentencing 2002* in which it is said:

18 *“Depending on the values of the property stolen and any other aggravating*
19 *factors, particularly where there is a breach of trust in the context of a*
20 *relationship of employment, an immediate term of imprisonment ranging from 1*
21 *to 4 years for a first offence and an order for repayment will likely be*
22 *imposed”.*



⁶ 2007 CILR 175

1 14. Unreported cases were drawn to the attention of the Learned Magistrate. In *R v*
2 *Henry Blodsit Ebanks*⁷ the Grand Court considered CI\$180.00 to be 'small'. The
3 Defendant in that case had pleaded guilty and a community service order was
4 imposed.

5 15. In *R v D. McLaughlin*⁸ a bank teller who had pleaded guilty to stealing
6 CI\$2,000.00 from a customer's account was sentenced to 4 months in prison. That
7 case seems to me to sit well within the lower range of sentence as explained in
8 *Clark*, and it does not appear that it was suggested in argument that CI\$2,000.00
9 was a 'small' amount of money. Indeed, it seems to me obvious that, once it was
10 determined that the case fell within the lowest range, a bank teller is in a high
11 position of trust thereby justifying an increase in sentence from a starting point near
12 the bottom of the lowest range. Nevertheless, keeping in mind the guilty plea, the
13 4-month sentence (which had clearly been reduced from 6 months) was roughly
14 equivalent to the sentence in the present contested case in respect of over twice the
15 amount of money stolen.

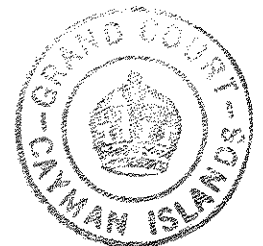
16 16. Mr. Brady has also drawn my attention to the 2012 case of *R v. S. McGowan*⁹ in
17 which an accounts officer in the immigration department was convicted of theft and
18 false accounting involving CI\$2,600.00 in 4 transactions over 4 months and had
19 altered records to cover up the thefts but received a sentence of 9 months
20 imprisonment suspended for 2 years.

21
22

⁷ Indictment No.: 0049/2009.

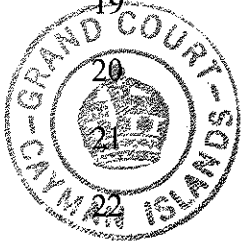
⁸ Reported in the Caymanian Compass on the 26th March 2009

⁹ Reported in the Caymanian Compass on the 12th January 2012



1 17. The Learned Magistrate accepted that CI\$946.00 was “on the very borderline of
2 custody”. However she then proceeded to draw the following conclusions. First,
3 that CI\$946 was not a small amount when judged against the income or school
4 expenses of an ordinary Caymanian resident. Second, that the level of trust placed
5 in the Appellant by her employer, coupled with the fact that she was a public officer
6 raised the case into the custody bracket. Was that the correct approach? In my
7 judgment, it was not.

8 18. The amount stolen in this case, though greater than the sum in *R v. Henry Blodsit*
9 *Ebanks*, was well below the amounts involved in *Nicoletta* and in *McGowan*. I
10 must remind myself that the total sum was made up of 6 separate thefts of
11 CI\$220.00, CI\$411.00 (made up of 3 unspecified amounts) and CI\$315.00. In my
12 judgment the question of whether sums are small is not to be decided with reference
13 to the perceptions of the public or against levels of trust placed in a public official.
14 I am guided by other cases decided in this jurisdiction as set out earlier in this
15 Ruling and those cases drive me to conclude that the amount stolen must be
16 considered to be small for the purposes of the guideline case of *Barrick*.
17 Furthermore, considerations based on other factors of culpability set out in *Barrick*
18 are not relevant to the decision as to whether the sum stolen is properly to be
19 categorized as small. Once such a categorization is made, the case, then, is to be
20 treated as if very exceptional circumstances apply with the effect that an immediate
21 sentence of imprisonment is no longer inevitable. Only then will the *Barrick*
22 factors come into play to assist in deciding whether immediate imprisonment must
23 nevertheless follow from a finding that the amount stolen was small and how long
24 such a sentence should be. *Barrick* merely says that an immediate sentence of
25 imprisonment is not inevitable if the amount stolen is adjudged to be small.




1 19. Was 16 weeks too long and should the sentence have been suspended? The *Chief*
2 *Justice's Statement on Tariffs* was not followed in *McGowan* but nevertheless
3 must be seen as the guiding principle. The aggravating factors were clearly set out
4 in the Sentence Ruling of the Learned Magistrate. They included the Appellant's
5 position as a public officer and the theft of public money.

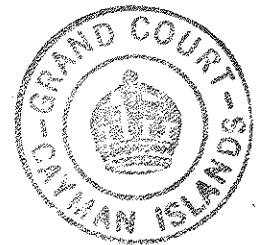
6 20. I can understand why the Learned Magistrate, having decided that the amount
7 stolen was not small, imposed an immediate sentence. I do not agree, having
8 concluded that the amount stolen was in fact small, that an immediate custodial
9 sentence was justified. The case crosses the custody threshold but there is
10 sufficient mitigatory material¹⁰ to justify suspension of the sentence. Sixteen weeks
11 was not too high – falling, as it does, towards the bottom end of the lower range of
12 sentence available according to the *Clark* guidelines. The sentence also fits
13 comfortably with that imposed in *McLaughlin*¹¹ allowing for his guilty plea.
14 However, I shall suspend the sentence for 18 months. To that extent this appeal is
15 allowed.

16

17 Dated this the 23rd day June 2015

18 

19 Honourable Mr. Justice Malcolm Swift (Actg.)
20 Judge of the Grand Court



¹⁰ Fully set out in the Social Inquiry Report (SIR)

¹¹ A sentence of 4 months = 17 weeks was imposed.