

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS**

**Criminal Appeal No. 5 of 2010**  
**(Summary Court Appeal No.48/08)**  
C#8789/07(1-3)

**Between:**

**ATTORNEY GENERAL**

**Appellant**

**- and -**

**MARLENE BOVELL-SWANSON**

**Respondent**

**Before:**

**The Rt. Hon. Sir John Chadwick, President**  
**The Hon. Mr. Justice E. Mottley, JA**  
**The Hon. Dr. A. Conteh**

**Appearances:**

John Masters, Crown Counsel for the Appellant  
Anthony Akiwumi of Stuarts Walker Hersant for the Respondent.

**Date heard:** 13<sup>th</sup> August 2010

**Judgment delivered:** 16<sup>th</sup> August 2010      **Reasons released:** 2<sup>nd</sup> September 2010

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**REASONS FOR JUDGMENT**

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1. This is an appeal by the Attorney General from the judgment of Justice Henderson allowing an appeal to the Grand Court from the conviction on 10 December 2008 of Marlene Bovell-Swanson after a trial before the Chief Magistrate in the Summary Court. The appeal is brought pursuant to Section 29(1) of the Court of Appeal Law (2006 revision). After hearing the appeal we indicated that it would be allowed for reasons that we would put in writing.

2. Ms Bovell-Swanson was convicted on three counts of theft from her then employer, Cayman Islands Crises Centre. The offences were committed in September and

October 2006. Each count was charged in similar terms. The first in time can be taken as an example:

“Marlene Ingrid Welch Bovell-Swanson of [address] is charged with the following offence: Theft Contrary to 35(1) of the Penal Code, (2006 revision)

### **Particulars of offence**

On or about the 14<sup>th</sup> September 2006, you stole \$2,000 from the Cayman Islands Crises Centre, namely by writing a Cayman Islands Crises Centre cheque for that amount in your maiden name and subsequently cashing it.”

3. At the relevant time, Ms Bovell-Swanson was employed as the Acting Executive Director of the Centre. In that role, it was usual for her to put cheques – which she had made out with the name of the payee and the amount to be paid - before a Board member for signature. It is not in dispute that she did make out the three cheques in question to herself as payee in her maiden name “Ingrid Welch”; and that she had put those cheques before Mr. Lendell Layman, the chairman of the Board for signature. It was alleged by the Crown - and confirmed by Mr. Layman - that he did not know the identity of the payee (Ingrid Welch): in particular, he did not know that the payee was Ms Bovell-Swanson in her maiden name. Mr Layman signed the cheques without enquiry. Ms Bovell-Swanson presented the cheques to the bank for payment; and used the proceeds of payment for her own purposes.

4. Ms Bovell-Swanson gave evidence that the three cheques represented payments to her for consultancy services which had been agreed in advance by Mr. Layman. She said that Mr. Layman had agreed upon a consultancy fee of “between \$2,000 - \$3,000 per month” for a maximum period of three months in recognition of what (she said) was additional work outside her terms of employment. The use of her maiden name on the cheques was to conceal that arrangement from others: in particular from other Board members (who could be expected to challenge the additional payments for consultancy services) and from a new Executive Director who was to be appointed in her place (who could be expected to see Ms Bovell-Swanson’s total remuneration package as a

benchmark for his or her own salary). The existence of any arrangement of that nature was denied by Mr. Layman.

5. The Chief Magistrate preferred the evidence of Mr. Layman to the evidence of Ms Bovell-Swanson. She did not accept that an arrangement of the nature described had been agreed with Mr Layman. She convicted Ms Bovell-Swanson of theft; and sentenced her to 21 months' imprisonment on each count, those sentences to run concurrently.

6. Ms Bovell-Swanson appealed to the Grand Court from both conviction and sentence. Her Notice of Appeal, dated 11 December 2008, challenged the Chief Magistrate's decision on both law and fact. In the present context it is sufficient to note that the Chief Magistrate was said to have 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 (rather than to simply recall a witness) after it had closed its case and after a submission of no case to answer; and
- (iii) in rejecting a further submission on the law (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.

7. The appeal came before Justice Henderson on 10 December 2009. He allowed the appeal for reasons set out in the judgment which he delivered on 2 March 2010. After setting out the facts and the history, the judge said this (at paragraph 11 of his judgment):

“The first three grounds of appeal concern events which occurred immediately after the Crown closed its case. Ms. Bovell-Swanson argued that there was no case to answer because the Crown had failed to prove a necessary ingredient of the offence of theft. Citing *Regina v. Kohn* 1979 69 Cr App R 395 (Court of Appeal), she said that the charges were defective because they should have, but did not, alleged the theft of a chose in action, i.e. the debt owed by the bank to its customer, the Crisis Centre. For further elaboration on this point, see *R. v. Williams* [2001] Crim L R 253 (Court of

Appeal); *R v. Ngan* [1998] 1 Cr App R. 331 (Court of Appeal); and “*Cheques and Balances*”, *Russell Heaton, Criminal Law Review*, 2005, page 747.

8. The judge went on, at paragraphs 12 and 13 of his judgment:

“The Learned Magistrate accepted this argument. She then rejected a submission by the Defendant as opposing any amendment of the charges and ‘invited’ the Crown to amend them . . .

The Crown has asserted before me that no request was made by it at any time for an amendment. The record supports that assertion. It contains no indication that the defendant was asked to plead to amended charges (as is required by section 74(1) *Criminal Procedure Code*, 2006 revision) or that any amendments were reduced to writing and made part of the record. I have searched through the record in vain for some clear exposition of how the charges, in their ‘amended’ form, are worded.”

9. At paragraph 16 of his judgment the judge summarised the position in these words:

“In summary, the defendant has been convicted and imprisoned on three ‘amended’ charges in circumstances where 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 Section 74.”

10. The judge concluded that there was no justification for a failure to follow the mandatory process of re-arraignment required by section 74 of the *Criminal Procedure Code*; and that, given that irregularity, the conviction could not stand. It was in those circumstances that he allowed the appeal and ordered a re-trial on all three counts.

11. Section 74(1) of the *Criminal Procedure Code* (2006 revision) is in these terms, so far as material:

“74(1) Where at any stage of a trial it appears to the Court that the charge is defective, either in substance or in form, the Court may make such order for the alteration or

addition of a charge, as the Court thinks necessary to meet the circumstances of the case:

provided that where a charge is altered, added or substituted as aforesaid, the Court shall thereupon call upon the accused person to plead to the altered or new charge: . . .”

12. The Attorney General gave Notice of Appeal to this Court dated 15 March 2010. The grounds of appeal set out in that Notice include the following:

“The Learned Judge erred in law by holding that there was a breach of Section 74(1) Criminal Procedure Code (2006 Revision); . . .”

13. In our view, there is no answer to an appeal on that ground. The proviso to section 74(1), which has been set out above, is not engaged unless a charge is “altered, added or substituted by the Court in such manner as the Court thinks necessary to meet the circumstances of the case”. The judge was correct to find that there is nothing in the record of the trial before the Chief Magistrate to support the view that the Summary Court did make any order for the alteration or addition of a charge in the case before it; or that any charge was substituted for the charges brought against the defendant. In those circumstances, the proviso to section 74(1) of the Criminal Procedure Code was never engaged.

14. The point can be tested by enquiring: “To what altered or new charge could the defendant have been called upon to plead? In what terms would the altered or new charge have been put to the defendant on re-arraignment?”

15. It is no answer to that question to point out – as was the case – that the Chief Magistrate accepted the submission on behalf of the defendant that the charges as laid were defective in failing to identify, correctly, the property belonging to the Crisis Centre which it was alleged that the defendant had appropriated. It is no answer to point to the fact that the Chief Magistrate invited the Crown to amend the charges. It is no answer to point out that the trial proceeded as if the defendant had been charged with appropriation

of a chose in action: that is to say appropriation of the whole or part of the debt owed to the Crisis Centre by its bankers and represented by the credit balance on its account. The facts remain that the Crown did not apply to amend the charges; the Court did not itself amend or vary the charges; and there were no amended or varied charges which could be put to the defendant under the proviso to section 74(1) of the Criminal Procedure Code.

16. The judge could – and in our view, should - have addressed the issues of law raised by the grounds in the defendant’s Notice of Appeal. The Crown having chosen, before him, to stand on the submission that the charges as drawn were not defective and needed no amendment, he should have addressed those issues on that basis. But he chose, instead, to allow the appeal on a ground which was not raised by the defendant’s Notice of Appeal; and which, on his own analysis of the record in the Summary Court and the Chief Magistrate’s Reasons, was not open to him in the events which had happened. In our view, he was wrong to do so.

17. This appeal must be allowed. The matter is remitted to the Grand Court for further determination of the defendant’s appeal on the grounds which were before it.

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Chadwick P

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Mottley JA

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Conteh JA

