IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

28/8/09

CICA #6/2008
(Indictment 80/07)

ADAM JOHN McINTYRE

Appellant

-AND-

HER MAJESTY THE QUEEN

Respondent

BEFORE: THE RT. HON. SIR JOHN CHADWICK, P.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE CONTEH, J.A.

Appearances: H. Hamilton Q.C., together with M. Facey-Clarke for the appellant and John Masters for the Crown.

Heard on 6 and 7 April 2009.
Judgment and Reasons delivered: 28th August, 2009

CONTEH, J.A.

The appellant, Adam John McIntyre, was found guilty on 10th April 2008, on eight counts of theft after a trial that lasted some two weeks conducted by a judge alone, without a jury. This is a procedure which an accused may elect for his trial and it is provided for in section 129 of the Criminal Procedure Code (2008 Revision). (More on this later in the context of the jurisdiction of this Court to entertain the appellant's appeal in this case).

2. On his conviction, the appellant was sentenced to a term of imprisonment for one year on each count, with the sentences to run concurrently. Against his conviction and sentence, he has now appealed to this Court. However, when the

appeal first came on for hearing on Monday, 6th April 2009, Mr. Howard Hamilton, QC, counsel for the appellant, informed the court that the appeal against sentence was being abandoned.

3. This judgment is therefore concerned only with the appellant's conviction on the charges of theft preferred against him at the trial.

4. The appellant worked in the Prison Services of the Cayman Islands. He was from 1999 to 2005 (the period covered by the counts in the Indictment), the coordinator of educational facilities for inmates. These included inmates taking courses with educational institutions outside. The appellant was responsible for the transmission of payments for the inmates' courses to the educational institutions. In this case, the educational institution was Thompson Education Direct, an establishment in Scranton, Pennsylvania, USA. The case for the Crown at trial was that instead of paying the monies to the course provider, the appellant paid them into his credit card account which he used for his own purpose. In his interview with the authorities the appellant said he paid the monies into his Visa card account and paid the course provider by installments. The pith of the Crown's case was that even if this were true, the appellant committed the offence of theft of the monies as soon as he paid them into his credit card account (see p. 22, lines 6 to 20 of the Records, the opening statement of Mr. Masters who prosecuted the case at trial.) On enrollment for a course, each prisoner/student was required to fill a Registration Form. A sample of this form was put in evidence as Exhibit 3. (More on this later).

Grounds of Appeal and the Jurisdiction of this Court

5. The appellant filed what can fairly be described as a medley of grounds of appeal, ten grounds in all, with permission being sought for the tenth ground on the day the appeal came on for hearing. However, because the appellant's trial and conviction ensued from a judge sitting without a jury (judge alone trial), Mr. John Masters, of counsel for the Crown in this appeal has argued and submitted in essence, that all the findings of the trial judge resulting in the appellant's conviction, were on questions of facts or at least questions of mixed facts and law. Consequently, he submitted the appellant's appeal falls within the ambit of section 7(b) of the Court of Appeal Law (2006 Revision). This section so far as material provides in terms:

> *"7. Subject to this Law, the Court shall have jurisdiction to hear and determine appeals from the Grand Court by a convicted person –*
>
> *(a) ...*
>
> *(b) with the leave of the Court, or upon the certificate of the Judge of the Grand Court before whom he was tried that it is a case fit for appeal, against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or upon any other ground which appears to the Court or the*

judge aforesaid to be a sufficient ground of appeal; and

(c) (on sentence which is not now relevant)."

6. I must state that this important issue of the jurisdiction of this Court on the grounds advanced on behalf of the appellant was not happily advanced in an appropriate or satisfactory manner: it was done in the course of the hearing of the appeal. In my view, it would have been correct and appropriate for the Crown to have urged, as a preliminary point, that the grounds the appellant sought to rely on were either grounds of facts or mixed facts and law, and that pursuant to para. (b) of section 7 of the Court of Appeal Law, the leave of this Court or a certificate from the trial judge that the case was one fit for appeal against the conviction, was necessary.

7. Mr. Hamilton QC for the appellant did not before the hearing of the appeal or during its hearing, seek leave of the Court. This is so presumably because he was of the view that the grounds of appeal raised issues of law alone, for which no leave is necessary, and with respect, the misconception that Henderson J before whom the appellant appeared on 15th and 17th April 2008 for bail after his conviction, had in granting bail also granted leave to the appellant to appeal.

8. I have had the benefit of reading the" Memorandum to Counsel" under the hand of Henderson J, dated 23rd April 2009, after the hearing of this appeal. I am satisfied that it can safely be concluded from this that what Henderson J directed his mind to on both 15th and 17th April 2008, was the issue of the grant of bail to

the appellant. Indeed, as the learned judge states in the second and third paragraphs of the Memorandum:

> *"The case first came before me on April 15, 2008, as an application for bail pending appeal. It does not appear from my notes that leave to appeal was requested or granted. I said that before considering Mr. McIntyre's bail application further, I would require a coherent statement of the grounds of appeal to satisfy myself that the appeal had a reasonable prospect of success. The application was then adjourned to April 17, 2008.*
>
> *At the resumption of the hearing on April 17, I concluded that there was sufficient merit in the appeal to justify the granting of bail pending appeal. I ordered that Mr. McIntyre be released on his own recognizance in the amount of $5,000 without surety or deposit ..."*

9. It would therefore be reading far too much into the outcome of the proceedings before Henderson J to say that he granted leave to the appellant to appeal to this Court. Therefore in my view, *requiring coherent statement of the grounds of appeal in order to satisfy (oneself) that an appeal had a reasonably prospect of success, before considering an application for the grant of bail pending appeal"*, is not with respect, the same as granting leave

to appeal. In law, Henderson J could, sitting as a judge of the Grand Court, exercise, pursuant to section 33 of the Court of Appeal Law, all the powers conferred on a single judge of the Court of Appeal as provided for in section 31 of the law. These powers include, in criminal cases, the power to, inter alia, extend time within which notice of appeal or application for leave to appeal may be given and admit an appellant to bail. But there was no application for leave to appeal or a determination of such application before Henderson J. Also for the purposes of section 7(b) it is not clear if Henderson J could have entertained such an application where the grounds of appeal relate to facts alone or mixed facts and law. He was not the judge of the Grand Court before whom the appellant's trial took place so that he could certify that the appellant's case was a case fit for appeal against conviction on any ground of appeal which involves a question of fact alone or a question of mixed fact and law.

10. It is the view of the Court that where a ground or grounds of appeal speak to a question of fact alone or a question of mixed fact and law, section 7(b) of the Court of Appeal Law requires the leave of the Court before such a ground or grounds could properly be entertained.

11. This conclusion is more readily applicable in cases involving trial with a judge and jury. In such a case questions of facts are for the jury and of law for the judge. (There is almost always a ritual incantation of this in nearly all summing-up to a jury in a criminal trial).

12. But the difficulty is in cases involving a judge alone trial, as in the instant case. Does the fact that the trial was by a judge alone preclude this court from entertaining an appeal without leave, against a conviction or allowing an appeal?

13. This is the brunt of Mr. Masters' contention on behalf of the Crown as he states in his written submission on the issues of the jurisdiction of this court in this case, which were forwarded by e-mail on 28th April 2008: he states in paragraph 34 of his written submission thus:

> *"14) When the accused made his selection to proceed by judge alone, as opposed to by way of trial by jury, he also by that selection deprived this Honourable Court of the jurisdiction offered by paragraph (sic) 9(1)(a) Court of Appeal Law (2006 Revision)"*

The Grounds of Appeal

14. I reproduce here the grounds of appeal, after amendments, filed on behalf of the appellant. I do so in the light of the fact that the Court did not have the benefit of Mr. Hamilton's settled grounds of appeal as he had promised during the hearing.

Grounds of Appeal

1. *The verdict is unreasonable having regard to the evidence.*
2. *The learned trial Judge erred when she failed to uphold the no case submissions, particularly in the*

light that a principal Crown Witness, Mrs. Claira Range contradicted and refuted one main plinth of the Crown's case, viz., that the Appellant had no authority to use his credit card, and supported another main plinth of the Defence that the reason why the Appellant had to make payments incrementally was because there had been cases where the Overseas Correspondence School had cancelled inmates courses causing them to lose a portion of their fees and cited one case in particular, Jason Hydes.

3. *The learned trial Judge misdirected herself on the issues of trusteeship, credit card payments and payments by installments, particularly, bearing in mind that the enrollment forms signed by each student contains the purpose for which moneys were paid and the method of payment and signature (see copy of exhibit 3) as well as the evidence of Mrs. Clara Range and Cecil Chan-a-Sue. (See letter form (sic) Elizabeth Smith of Royal Bank of Canada and statements of accounts from Thompson Education*

Direct which were addressed to the inmates showing amounts paid, dates paid and balance owing.

4. *The Learned trial Judge erred in failing to give reasons why she exercised her mind in relation to the directions in R v Ghosh, bearing in mind that she earlier expressed reliance on R v Feely.*

5. *The learned trial Judge erred in returning a verdict of guilty of theft on count 3 (re Eric McBean), Count 7 (re Al Murphy Bodden) and Count 9 (re David Cassidy Ebanks) when these Complainants were never called by the Crown and the contention of the Defence was that their monies were being held by the Appellant with their consent to be paid as per their instructions.*

6. *The learned trial Judge erred when she failed to give any reason whatsoever why she returned a guilty verdict on count 5 (re Duane Cranston) when Duane Cranston testified that he had consented to the Appellant holding the monies for him.*

7. *The learned trial Judge failed to give any reasons why she returned verdicts on the remaining counts 11, 13, 15 and 17.*

8. The Appellant intends to rely on his exemplary good character acknowledged by both the Court and the Prosecution as well as the fact that his conduct in committing these offences was not intrinsically illegal and reprehensible, (as in R v Guthrie and R v Hanna), as a strong basis for a reduction of sentence.

9. The Prosecution failed to make full disclosure (see back of Skeleton).

10.

15. These are without question, a miscellanea of grounds, as I have already noted. On their face some of them in my view, contain grounds of appeal on question of law alone (such as grounds 3, 4 and 5), some on grounds which are facts alone (such as grounds 6 and 7) and yet others on question of mixed law and fact (such as grounds 1, 2, 8 and 9). And with respect, Mr. Hamilton QC for the appellant did not in the course of the hearing make the position any clearer.

16. But, I think Mr. Masters for the Crown, is correct when he stated at paragraph 14 of his written submissions on issues concerning jurisdiction that the essence of the grounds of appeal is that the verdict of the judge was in all the circumstances of the case unsafe and unsatisfactory.

17. This I believe, was the basis for the court at the conclusion of the hearing of the appeal, inviting both sides to make written submissions on the issue of the

jurisdiction of the Court to hear and determine the appeal and reserved its judgment.

The Court's jurisdiction to hear and determine appeals against conviction

18. There is no doubt that this Court has jurisdiction to hear appeals against conviction in the Grand Court. This is provided for generally in Part III of the Court of Appeal Law (2006 Revision), in particular in section 7 which provides as follows:

> *"7. Subject to this Law, the Court shall have jurisdiction to hear and determine appeals from the Grand Court by a convicted person –*
>
> *(a) against the conviction on any ground of appeal which involves a question of law alone;*
>
> *(b) with the leave of the Court, or upon the certificate of the Judge of the Grand Court before whom he was tried that it is a case fit for appeal, against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or upon any other ground which appears to the Court or the judge aforesaid to be a sufficient ground of appeal; and*

(c) with the leave of the Court, against the sentence passed on his conviction unless the sentence is one fixed by law.

19. From this, it is clear the right of appeal of a convicted person whose grounds of appeal involve a question of law alone, have, as it were, an automatic or unconditional right of appeal. This is the effect of para (a) of subsection (1) of section 7. But in cases in which the grounds of appeal involve questions of facts alone or a question of mixed law and fact, the right to appeal is contingent on the leave of the Court or upon the certificate of the judge of the Grand Court before whom a proposed appellant was tried that it is a case fit for appeal. This Court can also grant leave to appeal on any other ground which appears to it or the trial judge in the Grand Court that it is a sufficient ground of appeal.

20. From this, it is reasonable to conclude that the Legislature in enacting the provision on the right of appeal against conviction in the Grand Court intended to afford a broad and liberal approach in keeping with the fundamental requirement that a person convicted of a crime should have the right to have his conviction reviewed by a higher tribunal.

21. The jurisdiction of this Court to hear and determine appeals against conviction is provided for in section 7 which I have set out at para. 18 above.

22. The jurisdiction to entertain appeals against conviction, whether automatic or contingent on leave is, it must be noted, different and separate from the grounds on which this Court can allow such appeals. The determination of

appeals against conviction is provided for in section 9 of the Court of Appeal Law (2006 Revision).

23. Section 9 provides as follows:

> *9. (1) Subject to section 12, the Court shall allow an appeal against conviction if it thinks –*
>
> *(a) that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory;*
>
> *(b) that the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or*
>
> *(c) that there was a material irregularity in the course of the trial,*
>
> *And in any other case shall dismiss the appeal:*
>
> *Provided that the Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if the Court considers that no substantial miscarriage of justice has actually occurred.*

(2) Subject to this Law, the Court shall, if it allows an appeal against conviction, quash the conviction and direct that a judgment and verdict of acquittal be entered, or, if the interests of justice so require, may order a new trial in accordance with such directions as the Court may give.

(3) On an appeal against sentence the Court shall, if it considers that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as the Court considers ought to have been passed, and in any other case shall dismiss the appeal.

(4) Where, on the conviction of the appellant, the jury has found a special verdict, and the Court considers that a wrong conclusion has been arrived at by the court before which the appellant has been convicted on the effect of that verdict, the Court may, instead of allowing the appeal, order such conclusion to be recorded as appears to the Court to be in law required by the verdict, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law.

24. There is therefore, some linkage between the jurisdiction of this Court to hear an appeal against conviction, whether as of right or contingent on leave of the Court, and the grounds or reasons on which the Court may determine such appeals either by allowing them or dismissing them. But section 9 does not confer a right of appeal whether as of right or contingent on leave of Court. It provides the cases in which the Court shall allow an appeal or dismiss it.

25. It is perhaps pertinent at this juncture to refer to the decision of the Privy Council in **Justis Raham Smith v The Queen (2000) 1 WLR 1644**. This was a case from Bermuda in which was canvassed similar arguments relating to appeals involving a question of law alone, question of fact alone and a question of "mixed law and fact." (The Board took the opportunity to observe that the more accurate expression for the latter trilogy of grounds of appeal is "a mixed question of law and fact.) The issue for determination by the Board in that case was one of statutory interpretation as to whether the grounds of appeal directed against the ruling of a trial judge on a no case submission was to be categorised as involving questions of law alone. The issue arose in the context of the defendant's appeal to the Privy Council against findings of the Court of Appeal of Bermuda that it had jurisdiction under section 17(2) of the Bermuda Court of Appeal Act 1964, to entertain an appeal against, inter alia, a no case submission by a trial judge and it then proceeded to set aside the trial judge's ruling that the defendant had no case to answer.

26. The case raised the interpretation of section 17 of the Bermuda statute which, (with some modifications not relevant here), are materially similar in

substance to sections 7 and 28 of the Court of Appeal Law of the Cayman Islands. The Court of Appeal of Bermuda had held that as a matter of jurisdiction it was entitled to entertain an appeal by the Crown against a trial judge's decision that the defendant had no case to answer and it then ordered a retrial of the appellant. On appeal to the Privy Council, the Board held that the trial judge's ruling on submission of no case to answer was not a decision on a pure question of law because the decision was based on his assessment of the strength of the evidence adduced by the prosecution and the inferences which could properly be drawn by the jury from the evidence. The Board then held that the Attorney General was not entitled to have appealed the trial judge's ruling under section 17(2) of the Bermudan statute which confined appeals by the Attorney General in the circumstances to only questions of law alone and that the Court of Appeal had erred in concluding it had jurisdiction to entertain the appeal.

27. The ratio of this case is of course a salutary reminder to a Court of Appeal in considering the reach of its jurisdiction to entertain appeals, it is, as the Board stated, *"of supreme importance to approach the problem correctly."* In the Smith case in the context of an appeal by the Attorney General, the Legislature had expressly confined it to grounds involving a question of law alone in section 17(2) in the Bermudan statute, which is almost ipsissima verba with section 28(1) of the Court of Appeal Law on the right of appeal by the Attorney General in the Cayman Islands.

28. In the instant case however, it is the right of appeal of a person convicted that is in issue. The appeal is of right under section 7(1)(a), if the ground of

appeal is one which involves a question of law alone. I have indicated at para. 15 of this judgment that in my view grounds 3, 4 and 5 of the appellant's Grounds of Appeal raise issues involving questions of law alone.

29. I draw additional support for this conclusion from the statement by the Board in Smith supra that *"It is also accepted practice in criminal courts to describe any ruling by a judge on a no case submission or indeed any other ruling by the judge, as one on a question of law."* (Emphasis added). There is added force to this conclusion I think in the special context of a trial by a judge alone without a jury, as in the instant case.

The appellant's trial in the Grand Court: by a Judge alone and its relationship with the grounds of appeal

30. The distinctive feature of the appellant's trial was that it was done by a judge alone without jury.

31. This is a procedure expressly provided for by the Criminal Procedure Code (2006 Revision) in section 129 which provides in terms:

> *"129. (1) If an accused person is of the opinion that, due to the nature of the case or of the surrounding circumstances, a fair trial with a jury may not be possible, he may, at least twenty-one days before the date of the trial or the date of arraignment, whichever is earlier, elect to be tried by a Judge alone, and such election shall be made by notice in writing addressed to the Clerk.*

(2) Notwithstanding subsection (1), a judge may permit an accused person to make an oral or written election at any time before a jury is empanelled where such accused person has proven that, because of exigent circumstances, it was not possible for him to make an election within the time specified in subsection (1).

(3) Thereupon the trial shall proceed before a Judge alone, and mutatis mutandis, Part IV shall apply thereto:

Provided that nothing in this section shall abridge or derogate from the powers conferred on a Judge by this or any other law.

(4) If any difficulty shall arise in respect of any such trial by a Judge alone, the court may give directions as to the procedure to be followed for the removal of such difficulty.

(5) Where there are two or more accused persons joined in the same indictment, the election mentioned in subsection (1) shall only be exercisable by all such accused persons jointly."

32. It is clear that this mode of trial is at the option and election of the accused. Because of this mode of trial, certain consequences have been urged on behalf of the Crown as impacting on the appellant's appeal to this Court.

33. Mr. Masters on behalf of the Crown has however, argued plausibly in his written submissions that because the appellant chose to be tried by a judge alone he thereby removed the option of appealing his conviction to this Court on a question of mixed fact and law, and presumably even on facts alone.

34. Mr. Masters also makes what I think is a rather bold submission: that even if this Court were to grant leave to the appellant, that on the grounds of appeal advanced on his behalf (which I have reproduced at para. 14 of this judgment) this Court has no jurisdiction to allow an appeal against conviction.

35. The reasons advanced for these contentions can be summarised briefly: First, in a trial by a judge alone, only grounds raising questions of law alone can be entertained, as the judge at trial was the judge of facts. Therefore as the grounds of appeal filed for the appellant show, no question of law, this Court should not entertain his appeal without leave. Secondly, because of the operation and relationship between sections 7 and 9 of the Court of Appeal Law, none of the appellant's grounds of appeal, in any event, would permit this Court to set aside his conviction.

36. I am however unable, after reflecting on the relevant provisions relating to this Court's jurisdiction to entertain appeals against conviction and the grounds on which it can determine such appeals, to agree with Mr. Masters' position.

37. In the first place, there is nothing in section 129 of the Criminal Procedure Code on trial by judge alone, that can be said to impact upon or exclude the right of appeal against conviction flowing from such a mode of trial. Secondly, there is nothing in section 7 of the Court of Appeal Law that relates to the mode of trial of

a convicted person for the purposes of appeal. The section speaks generally to the grounds of appeals and not to the mode of the trial from which the conviction appealed against ensued. These grounds may be on questions of law alone for which no leave is required, or on facts alone or a question of mixed law and fact, for which the leave of the Court is necessary.

38. Thirdly, in my considered view, it is quite possible that even a trial by a judge alone may well give rise to an appeal on grounds of law alone. It is not the mode of trial that conditions or determines the grounds of appeal. The appeal may well turn on a misdirection on the law or the misreception of evidence, even in a judge alone trial.

39. Fourthly, where the Legislature intended the mode of trial to control the ground of appeal in a trial by a judge alone, it expressly so provided in section 28 of the Court of Appeal Law. This sections provides that where an accused person tried on indictment is acquitted or discharged by a trial judge sitting alone or by a jury which has been directed by the trial judge to acquit or discharge, the Attorney-General or the complainant may appeal to the Court of Appeal against such acquittal or discharge on any ground of appeal which involves a question of law alone. There is no such restriction in section 7 of the right of appeal of a person convicted by the Grand Court whether by a judge alone or by a judge with a jury.

40. Moreover, section 9 of the Court of Appeal Law is, I find, a general provision relating to the determination of appeals against conviction. It addresses, in particular, the grounds on which the Court shall allow an appeal.

There is nothing in it, I find, that relates to the mode of trial of the convicted person appealing.

41. I therefore accept the submission of Mr. Hamilton QC that the words "verdict of the jury" in section 9(1)(a) must include the verdict of a judge alone at trial; this is only logical, reasonable and fair. The judge, in addition to being the determiner of the law, is as well the trier of facts. Therefore any determination by him at the end of the trial represents the "verdict of the jury" for the purposes of section 9(1)(a). Otherwise, a conviction returned by a judge sitting alone can never be allowed on appeal on the ground that it was, "under all the circumstances of the case unsafe or unsatisfactory." This, I find, would be unreasonable and untenable.

42. Mr. Masters' further position is that the appeal would only be allowed if there was a wrong decision of law and that in his submission there was no wrong decision on a question of law by the trial judge. In my view this is at the heart of this case and I shall return to it later in this judgment.

43. It is also contended for the Crown that in order for the appellant to succeed he must prove that there was a material irregularity at his trial. This, Mr. Masters submitted, he failed to do in that none of the grounds of appeal advanced for the appellant "specifically prays for relief on the premise that there was a material irregularity in the course of the trial.

44. The short answer to this is that a read through grounds 6 and 7 of the appellant's Grounds of Appeal will show that they expressly refer to the learned trial judge's failure to give any reasons why a guilty verdict was returned in

respects of counts 5, 11, 13, 15 and 17. In respect of count 5, the appellant complains that the guilty verdict was in the face of Duane Cranston's testimony that he had consented to the appellant holding the monies for him.

45. In any event, a person tried for a criminal offence has the right to know why he is found guilty of that charge. In my view, a generalized verdict of guilty, especially in a trial by a judge alone, would be far from satisfactory.

Disposal of the appeal

46. I stated at para. 42 of this judgment what, in my view, is at the heart of this appeal, namely, whether there was a wrong decision on a question of law by the trial judge. I now turn to this issue.

47. The appellant gave evidence in his defence. In my view, the trial judge having rejected the appellant's evidence, proceeded to think that that was the end of the matter. For example, she even interjected during the cross-examination of the appellant to this effect: *"Look Mr. McIntyre, don't think we are fools in this courthouse. You get $44 from Sherene Crowe to pay Education Direct, did you not?"* (At p. 1286, lines 6 to 9 of the Records). In the result, I find that the trial judge did not pertinently direct her mind to whether all the elements of the offence of the charge of theft had been established: rejecting the exculpatory evidence of an accused does not bring to an end the inquiry into guilt or innocence in a criminal trial. Before convicting, a court must always be satisfied not only that the evidence of the accused or that given on his behalf is not true, but also and perhaps more importantly, that every element of

the offence charged has been established by evidence that is itself truthful and reliable beyond reasonable doubt.

48. In the case of the offence of theft for which the appellant was convicted the ingredients are to be found in section 223(1) of the Penal Code (2005 Revision) which was read into the record by the trial judge. The ingredients are i) dishonest appropriation, ii) of property belonging to another, iii) with the intention of permanently depriving that other person of property.

49. I must observe here that the actual indictment preferred against the appellant on the counts of theft referred to section 229 of the Penal (1995 Revision) Code. From the records at pp. 1448 to 1450, there would seem to have been some confusion as to which revision of the Penal Code was applicable. The trial judge, in the event, at p. 1450 read from the 2005 Revision of the Code. It may be a matter of de minimis, but the appellant was charged for theft under section 229 of the 1995 Revision of the Penal Code. But there was no application to amend the indictment.

50. Be that as it may, I find nowhere in the trial judge's Reasons for Judgment at pp. 1449 to 1460, any advertence to or analysis of the ingredients of the offence, apart from her treatment of the element of dishonesty. I shall come to this later. The trial judge seems content, with respect, with only a mechanical recitation of section 223 of the Penal Code (2005 Revision) under which the appellant was not charged or tried.

51. At the appellant's trial, the evidence, in my view, seems to have been presented in a blunt outline without much in the way of detail or reference to the

counts of theft in the indictment on which the trial judge found him guilty. In particular, I find that it is not easy to accept or infer that because the appellant paid the monies he received on account of the inmates' education courses into his account that he stole the monies. This is so especially against the background of the use of the appellant's credit card to pay for the courses and materials for which the inmates were enrolled.

52. Central to the offence of theft is dishonesty: the dishonest appropriation of someone else's property permanently to deprive that person of it. Therefore in a case such as the instant one, it was appropriate for the learned trial judge, though sitting alone without a jury, to have advised herself of and taken into account the Ghosh direction **[The Queen v Ghosh (1982) 3 WLR 110, (1982) 2 All ER 889; (1982) 75 Cr. App. R. 154]**. To her credit, the learned trial judge in this case did this (see pp. 1456 to 1458, where she actually quoted the Ghosh formula.

53. But, I find, regrettably, that she then sullied the formula and proceeded immediately to water it down by posing the wrong question when she rhetorically added at p. 1458, lines 8 to 13:

> *"All that is left for me to decide in this case on the evidence in my role as a juror is – did this man act dishonestly when he converted the money which was given to him on a contractual or a trustee basis to pay Education Direct?"*

This surely was not a case of contract or trusteeship. The monies were given to the appellant for the payment of tuition and materials for the inmates' courses

from Education Direct. I find that the learned trial judge accordingly misdirected and misapplied the Ghosh formula which is really about ordinary standards of honest people.

54. Moreover, the course of dealing in this case showed that the practice was for the appellant to pay the monies into his own account and then use his credit card to defray often by installment payments the costs of the inmates educational courses. It is therefore, I find, difficult to conclude from this that according to the ordinary standards of reasonable and honest people, what was done by the appellant was dishonest.

55. Exhibit 3, which was tendered in evidence by. Mr. Daniel Greaves, the Deputy Director of the Cayman Islands Prison service, is a copy of a blank Registration Form filled in by inmates who are desirous of taking courses with Education Direct. This Form was generated by Education Direct. In addition to showing personal details of an enrolled inmate such as name and date of birth and address, it also has sections detailing methods of payment, that is, whether Full Payment Plan, Easy Payment Plan or Charge. The applicant is asked to tick one method of payment from the options provided. In the case of Full Payment if ticketed, it indicates that the applicant had enclosed a cheque or money order for the total programme price. In the case of easy Payment Plan, if this box is ticked, it indicates that the applicant has enclosed a check or money order for $100 as down payment. In the case of Charge, there are two boxes: i) if the top box is ticked, it indicates that the total programme price would be charged to the credit card (Visa or Master) indicated below, with the number of the credit card

and its expiration date. ii) If the second charge box is ticked, it indicates that only the $100 down payment will be charged to the credit card selected. The applicant/inmate then signs and dates the form. Above the applicant's signature are these words: *"My signature below indicates that I have read, understood and accepted the terms of this agreement as well as the enclosed Information describing my program selection. I am not bound by this agreement until a representative of the School accepts."*

56. This Exhibit in the context of this case was an important document. But in my view, the learned trial judge failed to appreciate its import and regrettably nowhere in her Reasons For Judgment, do I find any reference to the Form. It is therefore, I think, not surprising, that the learned trial judge, apart from her fleeting reference at p. 1455, lines 21 to 25, made no conscious, clear and particular reference to the burden and standard of proof of guilt which always rest in a criminal trial on the prosecution.

57. I find on this score therefore, that the learned trial judge misdirected herself on a question of law, and that the appellant's conviction ought to be set aside as the prosecution had failed to prove the counts of theft beyond reasonable doubt.

58. I find as well that there is nowhere stated in her Reasons for judgment why the learned trial judge found the appellant guilty of the counts of theft preferred against him. She simply entered findings of guilt at pp. 1459 to 1460 at lines 12 to 25 and lines 1 to 6 respectively of the Record. There was simply no analysis of the evidence in relation to any of the counts.

59. I accordingly conclude that under all the circumstances of the case, the failure of the judge to analyze the evidence and relate it to the several counts of theft on which she found the appellant guilty, his conviction on those counts should be set aside as well as being unsafe and unsatisfactory.

60. In conclusion, Mr. Hamilton QC rather belatedly and somewhat grudgingly, accepts in his written submissions for the appellant, the responsibility for the failure to seek the leave of the Court for the several grounds of appeal that involved questions of facts alone or questions of mixed law and facts. In my view the nature of some of the grounds of appeal clearly indicated that this was inevitable and therefore leave should have been sought.

61. Having said this, I will accede to the rather late application for leave and treat the hearing and written submissions as the application for leave.

62. In the result, for the reasons I have stated in this judgment at paras. 47 to 59, I will allow the appeal and set aside the appellant's conviction.

Conteh, JA.

CAYMAN ISLANDS COURT OF APPEAL

Sir John Chadwick, P:

I agree that this appeal should be allowed.

For my part I would allow the appeal on the short ground that the judge erred in law in failing properly to analyse the ingredients requisite to support the offence with which the appellant was charged under each count – for the reasons given by Conteh, JA – and so failed to direct herself correctly. Had she directed a jury

in the terms in which she sought to support her conclusions as a fact finder, there can be no doubt at all, to my mind, that guilty verdicts could not stand.

I am satisfied that this court has jurisdiction, under section 7(a) of the Court of Appeal Law (2006 Revision) to entertain the appeal; and I see no reason to apply a different test under section 9(1)(a) or (b) to that which would have applied had this been a conviction following a jury trial."

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Chadwick, P.

Justice I. Forte, JA.

I agree that this appeal should be allowed.

_____
Forte, JA.