IN THE GRAND COURT OF THE CAYMAN ISLANDS
SUMMARY COURT APPEAL NO SCA 0017 of 2018

BETWEEN	CAVENNA ELLIS	APPELLANT
AND	HER MAJESTY THE QUEEN	RESPONDENT

Appearances: Appellant in person
Ms. Toyin Salako for the Crown

Before: The Hon. Mr. Justice Patrick Brooks (Ag)
Hearing: 31 May 2019
Ruling: 12 June 2019

RULING

1. Ms Cavenna Ellis was tried in the Summary Court before Her Honour Magistrate Gunn, for the offences of theft and making a false document. The learned magistrate, after a protracted trial, convicted Ms Ellis of both charges, on 26 February 2018. On 1 June 2018 the learned magistrate sentenced Ms Ellis to imprisonment of three years and nine months on each count.

2. Although Ms. Ellis was represented by counsel at the trial, she has sought to represent herself in this appeal. She has appealed against both the convictions and the sentences. Her appeal is made pursuant to section 165 of the Criminal Procedure Code (2013 Revision). She contends that her trial was unfair in that:

   (a) the prosecution withheld documents that were important to her case; and

(b) counsel who appeared for her at the trial, mishandled the case, failed to follow her instructions in important aspects of her case, and otherwise acted unprofessionally in the conduct of the case.

Ms Ellis also contends that the learned magistrate erred in her findings of fact, which were adverse to Ms Ellis, and failed, in passing sentence, to take into account important aspects of the Social Enquiry Report which highlighted factors that should have been used in mitigation of the sentences.

3. In advancing her appeal, Ms Ellis applied for certain documents to be admitted as fresh evidence for the purpose of demonstrating the correctness of her assertions against the prosecution and learned defence counsel. This court heard the application, reviewed the relevant material, and reserved its ruling for delivery at the time of handing down its judgment in the appeal.

4. It is in the following order that this judgment will consider

(i) the case for the prosecution;

(ii) the case for the defence;

(iii) the learned magistrate's findings;

(iv) the complaint against defence counsel;

(v) the complaint against the prosecutor;

(vi) the application for fresh evidence;

(vii) the complaint about the learned magistrate's findings; and

(viii) the complaint against sentence.

(i) The case for the prosecution

5. Ms Ellis was, between 2010 and the first half of 2013, employed to Westel Limited, which trades under the name "Logic". The company will be referred to, hereafter, as Logic. She held various roles at Logic, including Office/Payables Administrator. The prosecution's case against her is that, between the months of April and June 2013, she removed the cash portion from the majority of Logic's bank deposits, and lodged only the non-cash portions. She facilitated that exercise by unlawfully preparing and using false lodgement slips in place of those prepared by Logic's cashiers. After the lapse of several days, or sometimes weeks, Ms Ellis would, each day, lodge to Logic's account, the exact amount of cash, in the exact denominations, that she had previously taken out of a day's deposit. The subsequent cash lodgements were financed, the prosecution alleged, from her continual removal of the cash from later deposits.

6. The result of that mode of operation was that, for a period of weeks, it only appeared to Logic that the bank was late in crediting Logic's account with the cash portion of the respective lodgements. Eventually, however, the tardy accounting was ordered investigated. Ironically, Ms Ellis' direct supervisor, Ms Shannon Oberpriller, tasked Ms Ellis with the investigation. It was then that Ms Ellis confessed to Ms Oberpriller about the dishonest scheme. She made a later confession to other senior management personnel.

7. Despite Ms Ellis' confession and offer to repay the money, Logic fired her and called in the police. In an interview that was conducted under caution, Ms Ellis also confessed to the dishonest scheme to Detective Constable Sherry Francella, who was assigned to investigate Logic's complaint. The interview was recorded. The transcript of the interview was admitted into evidence after a *voir dire*, or trial within a trial.

8. The total amount removed from the various lodgements, between May and June 2013, is CI$57,872.99, of which CI$20,102.76 was replaced as part of the delayed lodgement scheme. Logic's eventual loss is CI$37,770.23.

(ii) The case for the defence

9. Ms Ellis' case, at the trial, was that she was not the perpetrator of the scheme. She contended that she:

(a) was not the only person who made lodgements;

(b) did not have access to Logic's safe, where lodgements were kept overnight, prior to delivery to the bank;

(c) was not the author of the false replacement lodgement slips;

(d) was on vacation at a time when the anomalies commenced;

(e) did not make any confession to anyone at Logic; and

(f) only made the confession to Detective Francella under duress, having been previously threatened by the officer.

She contended that the flaw in the prosecution's case was demonstrated by the fact that the scheme continued during the time that she was on vacation from work. She opined that the case against her was the product of a conspiracy between Logic's senior management and Detective Francella.

(iii) The learned Magistrate's findings

10. The learned magistrate accepted the prosecution's case. She found that no one else had the opportunity to carry out the thefts. She found that Ms Ellis had hatched and executed

the dishonest scheme. The learned magistrate also found that Ms Ellis had made multiple voluntary and true confessions of her guilt.

(iv) The complaints against defence counsel

11. Ms Ellis fired her first salvo of complaints in the direction of counsel who appeared for her at the trial. As part of her attack, she sought to show, by exhibiting e-mail correspondence that, according to her, she and defence counsel were at loggerheads and that despite her attempts to have the legal aid authorities remove him from her case, he steadfastly refused to yield.

12. The e-mail correspondence does not support her in this regard. The documents show that defence counsel always indicated his willingness to be relieved of the case. A belated decision by the authorities to remove him was, however, reversed when he advised them, still offering no opposition to being replaced, that the only thing outstanding in the case was the learned magistrate's verdict. He was, however, replaced for the sentencing.

13. Ms Ellis next complaint against counsel was in respect of the calling of a potential witness, Ms Monica Peddie-Boothe. Ms Ellis wished to have called Mrs Peddie-Boothe to prove that Ms Ellis had no access to Logic's safe, where the lodgements were kept, awaiting being carried to the bank. The correspondence shows that defence counsel did contact the witness. Ms Peddie-Boothe was, however, overseas and was unavailable to attend court in person. Nonetheless, she was willing to testify by video link. Despite that indication, she was not called.

14. It is noted, however, that the evidence that Ms Peddie-Boothe was required to provide, was not being contested by the prosecution. Indeed, the learned magistrate in her outline

of the prosecution's case recognised, at paragraph 5 of her judgment, that Ms Ellis did not have access to the safe.[1] The failure to call Mrs Peddie-Boothe was, therefore, not detrimental to Ms Ellis' case.

15. The next complaint against defence counsel is that, in his correspondence with Ms Peddie-Boothe, he told her "the intricacies of the allegations made against [Ms Ellis]".[2] The complaint was first made directly to counsel by Ms Ellis' husband, who was very supportive of her, and was involved in the preparation of her defence throughout the entire proceedings. Learned counsel justified his actions to Ms Ellis, through her husband. He quite properly explained the need, in preparing a witness, to give a context to the witness in order to discover the evidence that the witness is likely to give when being cross-examined.

16. As part of the complaint against defence counsel, Ms Ellis also contended that he failed to diligently pursue the prosecution about the production of certain documents, namely:

(a) Logic's lodgement and banking information for the month of April 2013; and

(b) a copy of her most recent form of contract with Logic, especially with regard to her vacation leave entitlement.

His failure to do so, she contended, hampered an effective cross-examination of the prosecution witnesses.

17. When this court pointed out to her, during her oral presentation, that the documentation for April 2013 was eventually produced, Ms Ellis contended that they were, by then, no longer relevant. As far as her vacation leave entitlement is concerned, she accepted that

[1] Page 888 of the record of appeal
[2] Paragraph 33 of Ms Ellis' affidavit filed on 17 May 2019

the information concerning her return to the Island from vacation was advanced by defence counsel. Although she contended, in written and oral arguments, that she returned to the Island on 25 April 2013 and returned to work on 29 April, her evidence before the learned magistrate was that she returned to work on 25 April. The importance of the earlier date will be demonstrated later in this judgment.

18. Ms Ellis' also had a complaint about a familiarity between defence counsel and the prosecutor. She argued that it was prejudicial to her case. Allied to this complaint was an agreement between the prosecutor and defence counsel that closing submissions would be submitted in writing rather than made orally. Ms Ellis contends that she was entitled to have had her case conducted in open court.

19. The general complaint reflects a misguided perception by some lay clients that opposing counsel should be enemies rather than just opponents. In respect of the specific complaint about the submissions, it is noted that she was provided, in advance, with the submissions that defence counsel provided to the court. She took the opportunity to make adjustments to it. It is not clear which version was presented to the learned magistrate.

20. There is nothing in the issues raised in any of these complaints that caused any miscarriage of justice in the trial before the learned magistrate.

(v) The complaints against the prosecutor

21. Ms Ellis' complaint about the conduct of the prosecution is that it failed to give timely disclosure of the April 2013 banking transactions and of her vacation application form that supported her contention about her date of return to work from vacation in that

month. She accused the prosecutor of lying to the learned magistrate about having provided the April 2013 documentation to defence counsel from as far back as 2013.

22. The accusation was contained in her affidavit that was filed in response to an invitation by this court.[3] The prosecutor was not provided with Ms Ellis' affidavit until the day before the hearing of the appeal. The Crown made an application for time to allow the prosecutor to respond, but it was refused, as the court was not prepared to postpone the hearing. The delay in serving the Crown was, in part, but not entirely, due to Ms Ellis' fault.

23. Whether or not Ms Ellis is being truthful in this regard, the allegation is irrelevant to the outcome of the trial. The delay in providing the documents did not result in any miscarriage of justice. The April 2013 documentation was eventually provided. It enhanced rather than detracted from the prosecution's case. More will be said about that below. The defence also had an opportunity to cross examine the prosecution's witnesses, in respect of these documents, after they had been produced.

24. The vacation application form, although never provided, did not affect the outcome. As mentioned before, the reason for requesting it was to support Ms Ellis' assertion of the date of her return to work from vacation. She, nonetheless, gave that evidence. She said that she returned to work on 25 April 2013. The learned magistrate noted that evidence at paragraph 24 of her judgment[4] and, at paragraph 86, accepted 25 April as the date of Ms Ellis' return to work. Curiously, the learned magistrate, in a footnote to paragraph 86, stated "Note: Exhibit 6A records annual leave from 12th April to **27th April** inclusive"

[3] Paragraph 48 of Ms Ellis' affidavit filed on 17 May 2019
[4] Page 893 of the record

(bold type as in original)[5]. In this court's review of the voluminous evidence, that document was not seen.

25. The names of the counsel who appeared at the trial have not been set out in this judgment since the complaints made against them are without merit.

(vi) The application for fresh evidence to be admitted

26. This court's authority to admit fresh evidence, on an appeal, is apparently grounded in section 178 of the Criminal Procedure Code (2013 Revision). The section does not specifically deal with these circumstances but, in any event, the Crown did not object to Ms Ellis making the application. As will be seen below, the Crown's objection was to the admissibility of the proposed evidence.

27. Ms Ellis asks for the copy of her contract of employment to be admitted into evidence, for the purposes of the appeal. She contends that she had provided the document to her instructing attorneys-at-law, prior to the trial, but defence counsel was unable to produce it. The copy that Ms Ellis wishes to have admitted as fresh evidence, had been produced by Logic's Chief Operating Officer, Mr Lewie Hydes, as an appendage to a Victim Impact Statement[6] which was prepared as an aid to sentencing.

28. Her reason for this request is to demonstrate that she had 15 days vacation entitlement, and not 10 days, as her supervisor, Ms Oberpriller, had testified. The longer period, Ms Ellis contends, would not only have supported her contention in her submissions that she returned to work on 29 April 2013, but that it would have discredited Ms Oberpriller's testimony.

[5] Page 911 of the record
[6] Page 931 of the record of appeal

29. Ms Ellis also requests that evidence about her medical condition, associated with her then pregnancy, prior to the recorded interview by the police, be considered for the purposes of the appeal. She contends that, although she knew of the condition prior to the trial, she did not provide that information to her counsel, and consequently it was not brought to the attention of the court during the trial, nor indeed, during the *voir dire*. The reason for her failure to do so, she says, was the unhealthy state of their relationship, and her lack of trust in him.

30. She contends that the effect of this fresh evidence, if admitted, would be that a different view should be taken of the admissibility of the transcript of the interview. In that medical condition, it is no doubt being now contended, she was in such a vulnerable condition that Detective Francella's interview was totally oppressive. The interview, Ms Ellis contends, was therefore unfair and should not have been considered in evidence against her.

31. In supporting the application, Ms Ellis states, at paragraph 30 of her affidavit in respect of the fresh evidence concerning the interview that:

> "*This evidence is relevant as it relates to an issue that was a major deciding factor in both the conviction and the sentencing, the evidence is reliable and this evidence could reasonably be expected to have affected the outcome of the verdict when taken with the other evidence presented at the trial.*"

32. There are certain basic requirements for the admission of fresh evidence during an appeal. The party seeking to have that material admitted must show that the material:

(a) was not reasonably available during the trial;

(b) is relevant;

(c) is credible;

(d) would have made a difference to the tribunal considering the case;

and

(e) should be admitted during the appeal in the interests of justice.[7]

33. Neither of Ms Ellis' requests satisfies the requirements set out above.

34. The importance of the contract document is to support her evidence about the date of her return to work. The admission of the document would not have made a difference to the trial or the outcome. It is the date of return to work that is the critical element. Ms Ellis testified concerning that date. It was accepted by the learned magistrate. It is true that the vacation leave entitlement, set out in the document conflicts with Ms Oberpriller's evidence, but the discrepancy is not so material that it would have undermined the rest of Ms Oberpriller's testimony.

35. The evidence about Ms Ellis' health does not satisfy the first requirement for the admission of fresh evidence. On her account, she chose not to advance that evidence to the court. She would have been acutely aware, from the fact that a *voir dire* was being conducted to determine the admissibility of the transcript, that her fitness to be interviewed and her voluntary participation in the interview, was the essence of that exercise. She cannot be allowed, by just her say-so, to admit that evidence at this stage. It is also clear from the interview that she provided information to Detective Francella that the learned magistrate found to have exposed Ms Ellis' total familiarity with the dishonest scheme. The new material is unlikely to have affected the outcome of the *voir dire* or the trial.

[7] See **R v Alfred Parks** [1961] 3 All ER 633; **R v Sales** [2000] 2 Cr App Rep 431

36. In any event, the matter of Ms Ellis' emotional state at the time of the interview was considered by the learned magistrate. She said at paragraph 40 of her ruling on the *voir dire*:

> "*With regards [sic] to the allegation that Miss Ellis being emotionally distressed so as to affect the voluntariness and reliability of her answers, she did not directly speak to this in her evidence, nor that the pregnancy made her, or contributed to her making involuntary, false or unreliable statements. Nevertheless, I considered [defence counsel's] proposition given the evidence before me and applied common sense and Although [sic] being tearful is a sign of distress, which [Ms Ellis] also displayed while giving evidence, it was not such that would cause me to consider that she was not answering questions in [the] interview of her own free will and with a clear mind. Similarly, I was sure that her pregnancy did not cause her answers to be involuntary or unreliable.*"[8]

37. Ms Ellis' application for fresh evidence to be admitted must be refused.

(vii) The complaints about the learned magistrate's findings

38. Ms Ellis filed a notice of appeal containing only the generic complaint that the "[c]onviction was against the weight of the evidence and the sentence was manifestly excessive". She filed no separate grounds of appeal.

39. As noted above, Ms Ellis did file written submissions supporting the notice of appeal. Although wide ranging, and containing a significant amount of material that this court could not properly consider, because it was not in evidence before the summary court, it seems that Ms. Ellis has raised in her submissions the following issues for the consideration of this court:

(a) the correctness of the admission into evidence of the various alleged confessions;

[8] Page 143 of the record of appeal

(b) the correctness of the acceptance of the date Ms Ellis returned to work;

(c) the unreliability of the evidence about how Logic handled her suspension and later termination of employment;

(d) the absence of any handwriting expert's testimony concerning the fraudulent deposit slips; and

(e) the self-contradicting evidence in the prosecutions' case about the wire transfers that she made to her family in Jamaica.

40. Ms Ellis' submissions in respect of the alleged "in-house" confessions are two pronged. She asserts firstly, that the alleged confessions:

(i) to Ms Oberpriller;

(ii) in a later meeting, to the Chief Executive Officer, Mr Edenholm and Mr Hydes; and

(iii) in a still later telephone conversation, to Mr Hydes,

should not have been admitted into evidence. She argues that they were allegedly made to persons in authority and therefore were inadmissible as evidence against her.

41. Secondly she argued that the alleged confession to Detective Francella was based on intimidation and threats and, therefore, should not have been admitted into evidence.

42. The learned magistrate was wrong, Ms Ellis contends, to have relied on these elements of the prosecution's case, in arriving at her verdict.

43. Miss Salako, appearing for the Crown in this appeal, argued that there was nothing to prevent the admission of the various confessions to Logic's management personnel. Learned counsel pointed out that Ms Oberpriller's evidence was that, one day after Ms

Ellis had provided the documentation concerning the deposits to the bank, she asked to speak to Ms Oberpriller and made the confession that she was responsible for the delay in the bank crediting the cash deposits to Logic's account. The approach, on Ms Oberpriller's testimony, was unsolicited and was without any accusation being made.

44. In relation to the confession to Messrs Edenholm and Hydes, Miss Salako submitted that, whilst Ms Ellis had been called to meet with them, the meeting was not accusatory but rather, investigative. Learned counsel argued that Ms Ellis had already confessed to the taking. This meeting was to ascertain the amount that had been taken, by virtue of the scheme. She voluntarily gave that information and offered to repay the sum.

45. As far as the telephone call to Mr Hydes is concerned, Miss Salako submitted, it was totally unsolicited. It was Ms Ellis who had telephoned Mr Hydes and informed him of her plan to repay the money by instalments. In her call to Mr Hydes, Ms Ellis wanted to know what reference she should use in transmitting the payments to Logic. That again, submitted Miss Salako, was purely voluntary and therefore admissible.

46. Miss Salako submitted that the interview was not conducted by Detective Francella alone. There was also another officer present, Detective Spence. Learned counsel also noted that there was an audio recording of the interview. She submitted that Detective Francella is recorded as having asked open-ended questions and Ms Ellis had an opportunity then, to say that she had been denied legal representation or that she had been threatened. She instead, Miss Salako submitted, provided detailed answers to the questions.

47. The admission into evidence of a confession, which is not made in court, is by way of an exception to the rule against the admission of hearsay. Generally, the evidence of a

confession will be admitted unless it was obtained under circumstances that are considered to be involuntary or oppressive. The court will reject any alleged confession, which is obtained involuntarily. Confessions to persons in authority are also analysed by that standard.

48. The law in this regard was carefully considered by Smellie CJ in R v Rowe and Tibbets [2004-05] CILR 183. The learned Chief Justice considered the circumstances under which a person would be considered a "person in authority" for the purposes of the exclusion of evidence. He also pointed out that the court has a discretion as to whether an alleged confession may be admitted into evidence despite the absence of a caution. The learned Chief Justice accepted that admissibility will be based on an examination of the circumstances to determine if the confession was obtained involuntarily, by reason of fear of prejudice, hope of advantage or oppression. He said, at paragraph 28 of the judgment:

> *"While there is a discretion to admit statements obtained in breach of the Judges' Rules simpliciter (see R. v. Prager [[1972] 1 All ER 1114] which holds that the Judges' Rules are regarded only as a guide to whether a confession was in fact obtained involuntarily) and for instance where there has been a failure to caution, there is no discretion to admit a confession which was in fact obtained involuntarily or about which there is reasonable doubt. In the words of the Judges' Rules, this is in the sense that it has been obtained by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression."*

49. It is noted that there was no objection to any of Logic's executives giving the evidence that they did. The evidence from the executives support Ms Salako's submissions. An examination of the circumstances of each admission undermines any assertion of unfairness, fear of prejudice, hope of advantage, or of oppression. The evidence in respect of each encounter was that of voluntariness on Ms Ellis' part.

50. The issue before the learned magistrate, at that stage, was not whether the statements were made to those persons voluntarily, but whether they were made at all. The evidence of the executives was refuted by Ms Ellis, who testified that she made no such admission to any of them.

51. In the end, the contending evidence was properly before the learned magistrate and she accepted the evidence of each of the executives in preference to Ms Ellis'. She saw and heard the witnesses and was entitled to decide whom she believed.

52. It may also be said at this juncture, that the learned magistrate found support for her finding against Ms Ellis in this regard. The learned magistrate noted the evidence that Mr Hydes had sent an e-mail to Mr Edenholm confirming his telephone conversation with Ms Ellis. The learned magistrate recorded the relevant parts of the e-mail at paragraph 48 of her judgment. It stated:

> *"I just received a call from Cavenna [Ellis] who is trying to reach Shannon [Oberpriller]. I told her Shannon was off island and asked her what it was in reference to. She said she just wanted us to know that she intended to fulfil her promise to repay the money she had taken. She was now working and would probably start paying Logic back starting with the proceeds from her next pay day which would be 23rd August. She wanted Shannon to be aware that it would be in the form of a draft from the government credit union. She also asked what if anything Shannon wanted the draft to reference. I told her I would pass on the information and someone would get back to her before the 23rd. Her number is 345 925 4164."*[9]

53. The learned magistrate accepted that e-mail as a truthful record, partly because of its timing. It was sent on 12 August 2013 at 11:58 am "after DC Francella's call but before [Ms Ellis] arrived at the [Financial Crimes Unit]" (paragraph 92 of the judgment)[10].

[9] Page 900 of the record of appeal
[10] Page 913 of the record of appeal

54. It is also significant that, on the same day that Mr Edenholm met with Ms Ellis, he also sent an e-mail that recorded the salient points of the meeting. The e-mail was admitted into evidence as Exhibit 4. It stated, in part:

> *"Lewie [Hydes] and I met with Cavenna [Ellis] this morning.*
>
> 1. *She admits to taking the money*
> 2. *She does not have the money to pay back*
> 3. *If she could keep her job, she would accept garnishment of wages*
> 4. *She said she owes CI$37k according to her records*
> 5. *She said it was for a family situation*
> 6. *Based on conversations with Mike and Nyon, we did not provide a statement for her to sign*
> 7. *I did not request her to provide her own statement of guilt.*
>
> ...."[11]

55. During the *voir dire*, the learned magistrate heard evidence concerning Ms Ellis' interview with the police. The audio of that interview was recorded. The learned magistrate produced a detailed written judgment on the *voir dire* which outlined the evidence and her assessment of it.[12] She ruled that the interview had been voluntary and fair. The learned judge explained her reason for accepting Detective Francella's evidence and for rejecting that of Ms Ellis and her husband. The transcript of the interview was therefore admitted into evidence.[13]

[11] Page 270 of the record of appeal
[12] Page 130 of the record of appeal
[13] Page 24 of the record of appeal

56. An appellate court does not lightly set aside the result of an exercise of a discretion, as this decision was. There was, however, nothing about the learned magistrate's ruling on this issue that could be properly complained about.

57. Ms Ellis' complaint about the treatment of the various confessions is without merit.

58. The unmeritorious nature of Ms Ellis' complaint, about the learned magistrate's acceptance of the date Ms Ellis returned to work, has already been demonstrated. It should be said, however, that the learned magistrate carefully pored through the mass of documents and identified that the dishonest conduct

(a) started in early April 2013;

(b) took a hiatus during the time that Ms Ellis was on vacation;

(c) resumed when she returned from vacation;

(d) was capable of being concealed, by Ms Ellis, from detection; and

(e) could not have been done by anyone else.

59. The following table, by way of example only, demonstrates the accuracy of the learned magistrates' findings:

Lodgement Batch Number	Date Lodgement Prepared	Date of lodgement as per bank stamp	Date Cheques Credited to Account	Date Cash Credited to Account
3018	2 April	8 April	8 April	2 May
3074	16 April	19 April	19 April	19 April
3072	17 April	19 April	19 April	19 April
3076	17 April	19 April	19 April	19 April
3077	18 April	23 April	23 April	23 April
3088	22 April	30 April	30 April	7 May
3098	22 April	6 May	6 May	9 May
3101	25 April	1 May	1 May	14 May
3148	7 May	10 May	10 May	6 June
*3186	16 May	21 May/3 June	21 May	3 June

* Although the cashier prepared one lodgement slip, with both cash and cheques included, these deposits had separate slips exhibited for cash and cheques respectively – both with bank stamps.

60. Ms Oberpriller testified that none of the cash included in lodgements prepared for transmission to the bank, between 27 May and the date of Ms Ellis' first admission of culpability, was credited to Logic's account. She said that the bank would stamp one of the deposit slips, which accompanied the lodgement, and return that slip to Logic. She testified that it was Ms Ellis responsibility to attach the deposit slips, bearing the bank's acknowledgment stamp, to the balance sheet which already had a copy of the deposit slip. Ms Ellis, therefore, had the opportunity to falsify the slip that the bank returned, by improperly writing in the cash details in order to conceal the fact that the bank had not received the cash. That evidence also supported the learned magistrate's findings.

61. Ms Ellis argued, next, that the evidence provided by Logic, concerning her suspension and later termination of employment, was unreliable and undermined the prosecution's case. She pointed out that Ms Oberpriller's evidence that she sent home Ms Ellis the very day that the alleged voluntary confession, was made was proved to be untrue by Mr Hydes' evidence.

62. She also asserted that the unsigned letter (Exhibit 2)[14], purportedly acknowledging her admission to stealing, produced by Mr Edenholm as being the letter given to her at the time of her dismissal, was demonstrably a false document. The letter that she produced (Exhibit 5)[15], bearing the same date as Exhibit 2, she said, supported her version of the events surrounding the dismissal, that is, that she was given a cheque in settlement of the monies due to her, and sent on her way, without an explanation.

[14] Page 278 of the record of appeal
[15] Page304 of the record of appeal

63. The learned magistrate did not specifically assess Ms Oberpriller's evidence concerning sending Ms Ellis home. She recounted that Ms Oberpriller testified that after receiving Ms Ellis confession of dishonesty, she sent her home for the rest of the day, which was a Friday.

64. There is no merit in the complaint about this aspect of the evidence. Whether or not Ms Ellis was sent home for the rest of that workday is immaterial. Ms Oberpriller went on to testify that Ms Ellis was suspended the following week. That testimony was supported in part by Mr Hydes, who said that Ms Oberpriller spoke to him and he gave Ms Ellis a letter of suspension the following week.

65. The learned magistrate, however, did specifically address the issue of the letters of dismissal. She did so at paragraphs 97 and 98 of her judgment.[16] She accepted that Exhibit 2 was a genuine document, and "a true reflection of the content of the letter given to [Ms Ellis] on her termination" (paragraph 97). She found that Exhibit 5 did not "trouble" her, "as it was dated (at the signature line) after the meeting during which [Ms Ellis] was dismissed" (paragraph 98).

66. Ms Ellis also complained about the absence of any handwriting expert's testimony concerning the fraudulent deposit slips, which were attributed to her. The learned magistrate recognised the absence of that evidence. She, however, did not need to have handwriting evidence to support her findings. It was clear from some of the documents that the deposit slips, which ought to have been identical because three of the four copies were carbonised, were in fact different. Even Ms Ellis accepted in cross-examination that

[16] Page 915 of the record of appeal

that was so.[17] There was no doubt that there was dishonesty. The issue was, who was the thief. The learned magistrate found that only Ms Ellis had the opportunity to execute the dishonest scheme, and her confession confirmed that she was the thief.

67. As part of her assertion that the prosecution's case lacked foundation, Ms Ellis argued that there was some suggestion in that case that she had sent the sums to Jamaica by way of remittances. She said that the records of her transactions with JN Money Transfer were produced in evidence, but did not support the prosecution's case. The money that she sent to Jamaica was minimal, when compared to the amount Logic had alleged to have been stolen.

68. The learned magistrate examined that evidence. She noted that the wire transfer documentation did not account for the stolen funds. She said however, that she was not perturbed by the absence of a money trail. She said at paragraph 96 of her judgment:

> *"The absence of evidence of extravagant lifestyle or large sums of money being transferred to Jamaica does not cause me concern as cash is easily spent, concealed and transmitted by means other than traditional remittance services."*[18]

69. The various findings of fact by the learned magistrate cannot be disturbed. They are based on evidence, which has not been discredited, and was therefore open to acceptance by her.

(viii) The complaint against sentence

70. Ms Ellis argued that the sentences imposed were manifestly excessive. She cited a number of previously decided cases to show that the sentences usually imposed for offences similar to those for which she has been convicted, was significantly shorter. In

[17] Page 96 of the record – lines 37-42 – and page 97 – line 1
[18] Page 914 of the record of appeal

addition, Ms Ellis submitted that the learned magistrate erred when she failed to take into account certain mitigating factors, namely:

(a) Miss Ellis was the only breadwinner in her family at the time of sentence;

(b) The Social Enquiry Report recommended alternative sentencing; and

(c) One of Ms Ellis' children was very sick at the time.

71. Miss Salako submitted that the learned magistrate did not make any error. She pointed out that the learned magistrate reminded herself of the Chief Justices' Guidelines for sentencing and recognized that where there is a breach of trust, as in this case, the sentence should be between one and four years and there should be immediate custody. Learned counsel argued that the learned magistrate considered

(a) the relevant authorities;

(b) the degree of culpability involved in the offence; and

(c) the degree of harm imposed.

72. Miss Salako submitted that the learned magistrate did consider the relevant mitigating factors including the fact that Ms Ellis was the sole provider for her household. Learned counsel submitted that the sentences are in accordance with the guidelines and the authorities, and that they should not be disturbed.

73. Ms Ellis was charged pursuant to sections 241 and 282 of the Penal Code (2010 Revision) Section. Section 241 stipulates the sentence for theft. It states:

> "*A person who commits a theft commits an offence and –*
>
> *(a) where the value of the thing stolen does not exceed five thousand dollars, is liable on summary conviction to imprisonment for seven years; and*

(b) where the value of the thing stolen exceeds five thousand dollars, is liable on conviction on indictment to imprisonment for ten years."

74. Making a false document falls under the definition of forgery (see section 280 of the Penal Code). Section 285 stipulates the sentence for forgery. It states:

> *"A person who forges any document commits an offence and is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years.*

There is no indication of any other provision being relevant to the documents that Ms Ellis falsified. The maximum sentence that could have been imposed upon her for this offence is, therefore, three years.

75. Sentencing is an exercise which lies in the discretion of the sentencing judge or magistrate and should be tailored to the offence and the offender. In more recent times, the judiciary has had the benefit of guidelines that assist the sentencer in determining the normal range of sentences for a particular offence. The guidelines also assist the legal profession and the public in identifying the likely sentence that would be passed for any particular offence. In this context, the assistance provided is through the Statement of Tariffs and Guidelines for Sentencing for Certain offences (The Chief Justice's Sentencing Guidelines (2002)), and the United Kingdom's Sentencing Council's publication "Theft Offences Definitive Guideline" (the SGC Guidelines).

76. Based on those guidelines, one principle may be considered as being overarching, in considering Ms Ellis' case. It is that an offence of theft which involves a breach of trust requires an immediate custodial sentence.[19]

[19] See page 7 of the Chief Justice's Sentencing Guidelines (2002)

77. **R v Robert Aspinall** (CICA 16/2016, judgment delivered on 7 November 2016), which was referred to by the learned magistrate, helpfully guides judges and magistrates in this jurisdiction in applying a merger of the two sets of guidelines, for the purposes of offences such as the present ones.

78. The following principles may be gleaned from the judgment of Sir Bernard Rix JA, who delivered the judgment of the court:

(a) the older cases, including **R v Clarke** [1998] 2 Cr App P 137 (on which Ms Ellis relied, in part), have been largely superseded by the SGC Guidelines;

(b) the sentences set out in the SGC Guidelines should be increased to reflect the higher maximum sentences, which apply in this jurisdiction;

(c) forgery increases the level of criminality and ought, in the normal case, to result in a sentence running consecutively to the sentence for theft; and

(d) 10 years imprisonment may not be unusual for theft involving a breach of trust.

79. In applying those principles it may be noted that the learned magistrate correctly pointed out that this case involved:

(a) a breach of trust;

(b) a significant degree of planning;

(c) forgery;

(d) a significant degree of harm, in terms of value;

(e) a significant degree of harm in terms of inconvenience and emotional distress.

80. Based on those factors, the learned magistrate, not unreasonably, identified the range according to Category 1A, using the SGC Guidelines but applying the "uplift" or increase to recognise the higher sentences in this jurisdiction. She identified a starting point of four years and applied both aggravating and mitigation factors to that figure before arriving at the sentence that she imposed.

81. Ms Ellis is incorrect in asserting that the learned magistrate did not take into account the fact that she was the sole breadwinner for her family or that she had to take care of her three children. Miss Ellis is also inaccurate in her contention that the Social Inquiry Report recommended an alternative to a custodial sentence. The Report left the matter open for the decision of the learned magistrate. The relevant portion stated:

> "*According to the [risk assessment tool **Ms. Ellis** is a Very Low risk to re-offend and it does not appear that a Community based Supervision Order would be necessary.*
>
> *This matter may attract a custodial sentence as requested in the Victim Impact Report. By incarcerating the **Client** her family would be greatly impacted. Other options could include a Community Service Order, a Suspended Sentence or a Curfew Order.*"[20] (Bold type as in original)

Even if the Report had recommended an alternative sentence, the learned magistrate was not only not bound by the recommendation, but would have been obliged to ignore it if the established sentencing principles dictated that a custodial sentence was required. Ms Ellis' complaints in this regard are without merit.

82. It is true that the learned magistrate did not mention anything about any of Ms Ellis children being ill; however, the Social Inquiry Report did not specifically make that assertion. It said that Ms Ellis twins had been born prematurely and had had significant health challenges shortly after birth. It, however, went on to say:

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[20] See page 927 of the record of appeal

> *"One of the twin girls has had two major surgeries to date...and will be in need of another surgery in the future. Ms. Ellis stated that both of the children have done much better than they were expected although they still experience some difficulties."*[21]

83. The learned magistrate, despite her commendable handling of the voluminous material and her clear judgment, did err in respect of the sentence imposed for making a false statement. The maximum sentence for that offence is three years. Although there would be no practical effect on the sentence that Ms Ellis should serve, the sentence for this charge must be reduced. A sentence of two years imprisonment would be appropriate in this regard.

Conclusion

84. This was an exceptionally strong case for the prosecution. A conviction was inevitable. Ms Ellis' various complaints concerning conviction are without merit and therefore her appeal must fail.

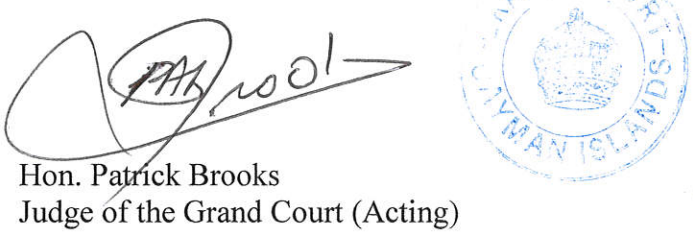
85. The complaint in respect of the sentence for the offence of theft is likewise without merit and must fail. The sentence for making a false statement was, however, in excess of the statutory maximum and shall be reduced to two years imprisonment.

Order

1. The appeal against conviction is refused and the conviction is affirmed.
2. The appeal against sentence is allowed in part.
3. The sentence in respect of the offence of theft is confirmed.

[21] See page 920 of the record of appeal

4. The sentence in respect of making a false statement is set aside and a sentence of two years imprisonment is substituted therefor. The sentences are to run concurrently.



Hon. Patrick Brooks
Judge of the Grand Court (Acting)