BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal
Appeal No. 20 of 2005

BETWEEN

BELFIELD RANDOLPH McCOLLIN Appellant

AND

THE QUEEN Respondent

BEFORE: The Hon. Frederick L.A. Waterman, CHB, the
Hon. Peter D.H. Williams and the Hon. John A. Connell, Justices of Appeal.

2007: June 13, September 18 and 19

2008: April 25

Sir Richard L.
Cheltenham, K.A., Q.C. in association with Mr. Deighton Rawlins and Ms. Verla
De Peiza for the appellant

Mrs. Donna Babb-Agard in
association with Mr. Alliston Seale for the respondent

DECISION

-

WATERMAN
JA:

INTRODUCTION

-

[1]

The appellant, Belfield Randolph McCollin, was charged with seven counts of theft contrary to ***section 3(1)*** of the ***Theft Act, Cap. 155*** that on various dates covered by the indictment, December 1997 to August 2000, he stole sums of money belonging to the Crown in the right of its Government in the Island of Barbados and that in each case he intended to deprive the Crown permanently of the money which in aggregate totalled $16,935.00.

[2]

On 18 May 2005, the appellant was convicted on all counts, and was sentenced by **Blackman J** on 7 June 2005, in respect of the first count, to three years' imprisonment, suspended for a like period. In addition, he was fined $15,000.00 payable in nine months or, in default, three years' imprisonment. He was also ordered to perform 240 hours of community service. In respect of counts two through seven, he was convicted, reprimanded and discharged.
The conviction in each case has been challenged and forms the subject of this appeal.

[3]

The grounds of appeal are:

(a) That the trial judge committed a material irregularity in the course of his summation which was both confused and confusing:

(i)
in misidentifying the elements of the offence of theft;

(ii)
by illustrating the element of intent to permanently deprive the owner by reference to the case of ***R. v. Fernandes [1996] 1 Cr.App.R. 175;***

(iii)
by suggesting that the loss of a benefit to the owner is part of the definition of theft.

(b)
The failure of the trial judge to break down each element of the offence of theft in the context of the evidence was a non-direction which constitutes a misdirection in law.

(c)
The circumstances of this case called for a direction in accordance with that given in ***R. v. Hinks [2000] 4 All ER 833***.

(d)
The trial judge not only adopted as his own the highly prejudicial and gravely improper approach of the prosecutor but ignored and undermined the appellant's right to silence and his privilege against self-incrimination.

(e)
By directing that no evidence had been led by the defence in circumstances in which the appellant made an unsworn statement, the trial judge denied the evidential nature of the unsworn statement and effectively withdrew the appellant's defence from the jury.

(f)

By further directing that the only evidence led in this case had been led by the Crown, the trial judge disregarded the defence's right in our adversarial system to rely on evidence and/or inferences favourable to its case coming from the prosecution witnesses.

(g)

By still further directing that there was no evidence of any other kind coming from any other source than from prosecution witnesses, the summation became unbalanced and unfair and thereby destroyed any likelihood of an acquittal.

(h)

The trial judge erred in law when he failed to assist the jury with an interpretation and analysis of the unsworn statement.

(i)

The trial judge erred in law when he went outside the boundaries of permissible conduct and prejudiced the case against the appellant in the circumstances set out below:

(a)

when he described the borrowing and repaying of monies in the Court Process Office over a period of time as an "euphemism";

(b)

by instructing the jury that "the Crown did not have the benefit of the money to help pay your salary…";

(c)

drawing the jury's attention to the evidence of Mr. Springer that some cheques were stale-dated for four months or longer and that one had to be actually refreshed without at the same time indicating that

this is not evidence of guilt may have misled the jury in weighing that fact against the appellant;

(d)

in reminding the jury of the unsworn statement of the appellant from the dock, the trial judge broke the sentence "I also availed myself of the practice" and added the underlined "nice words".

(j)

The trial judge erred in law when he dismissed the submission(s) that the indictments were inaccurately drawn and invalid and did not reflect the evidence either at the preliminary inquiry or at the trial which established that the monies in question were not owned by the Crown.

SUMMARY OF THE PROSECUTION'S CASE

[4]

The Crown led evidence that at the material time, the appellant was Chief Marshal for Barbados and the head of the Court Process Office. As part of his duties he was responsible for the day to day administration of that office. Further, among other duties, he was responsible for having monies collected by the Marshals from persons who owed money to the Government and for ensuring that monies so collected were paid into the Court Process Office and thereafter paid into the Department's account at Barclays Bank PLC, to which account the appellant was a signatory. In fact, that account was set up in the appellant's name as Chief Marshal.

The appellant from the evidence led had an account in his name, a personal account, at The Bank of Nova Scotia.

From this account from time to time he wrote cheques out of the Department's account payable to the Legal Assistant, Magistrate's Court to cover monies previously paid to him, contrary to the Financial Rules.

[5]

It happened that after a number of spot checks and surprise inspections of the Court Process Office's accounts and financial documents were carried out by public officers in the Auditor General's Office certain irregularities were discovered. It was also discovered that the Chief Marshal and his Legal Assistant were not complying with the Government's Financial Rules with regard to depositing cheques when they were received.

[6]

Subsequently, owing to non-compliance with the Financial Rules and the irregularities mentioned above, a number of audits were conducted on the Department's accounts and cash shortages were discovered. In addition, a number of cheques were found payable to the Court Process Office, drawn on the Chief Marshal's personal account at The Bank of Nova Scotia, which again were not deposited forthwith, as they should have been.

[7]

It was further uncovered during the audits that the Chief Marshal had been using the Legal Assistant of the Magistrate's Court to cash cheques, on his behalf, out of the cash collected by the Marshals by way of writing a personal cheque and drawing cash from the office.

[8]

It was revealed by John Haynes, Legal Assistant attached to the Magistrate's Court, in his evidence that there was a practice existing in the Department to cash personal cheques for officers working in that Department.

[9]

Evidence was also given by Barry Springer, Legal Assistant in the Court Process Office, that he issued

certain cheques, drawn on the Court Process Office's account to the Legal Assistant in the Magistrate's Court to repay certain amounts issued earlier to the Chief Marshal. In short, the Crown's case was that the appellant used an elaborate scheme to steal money from the Crown.

THE DEFENCE

No-case submission by the appellant

[10] Mr. Rawlins, Counsel for the appellant at the trial, made a no-case submission on the basis that (i) there was no loss to the Government as all amounts taken were repaid; (ii) the element of dishonesty had not been proved; (iii) the intention to permanently deprive was not proved; (iv) in his role as Chief Marshal, the appellant had power and control over these sums of money; and finally, (v) there was no evidence that when the Chief Marshal obtained the monies he was not acting on behalf of a suitor.

[11] These submissions were overruled and the case proceeded.

[12] The appellant in his defence made an unsworn statement on his behalf simply denying that he had any intention to steal any money and stating that it was the practice of officers at all levels to cash cheques in both the Magistrate's Court and the Court Process Office and that from time to time he availed himself of the practice. That some of the cheques cashed by him were at times held for a period of time and then were deposited to his account. On one occasion, he said, a cheque was returned and when Mr. Springer drew it to his attention he

promptly gave Springer the cash.

THE APPEAL

Ground (a)(i)

[13] We granted leave and proceeded to hear the appeal. Counsel for the appellant complained that the trial judge committed a material irregularity in the course of the summation which was both confused and confusing by misidentifying the elements of the offence of theft. He contended that the trial judge replaced the element of intention to **permanently** deprive the owner of the property in issue by the notion of **fraudulently** depriving the owner. He further submitted that the offence with which the appellant was charged was the offence of theft simpliciter. That the introduction of the element of fraud altered the character of the offence and was a misdescription and a misdefinition of the offence under consideration. To the extent, he said, that the defence was founded in part on not having any intent to permanently deprive the owner of the monies it was all the more important that this element of "permanently depriving" be accurately and fully put to the jury.

[14] **Sir Richard Cheltenham, Q.C,** who did not represent the appellant at the trial, sought to make an issue of this error on the part of the judge. The trial judge stated the element of intention to permanently deprive correctly, at page 186, when quoting ***section 3*** of the ***Theft Act*** as the pertinent section. He reiterated this element of the offence, at page 187 and stated:

> "And finally, the prosecution must prove that the accused had the intention of

permanently depriving the owner, the Crown, of the several monies allegedly misappropriated";

again, on page 188, lines

1-3 he said:

"Counsel
for the defence in his closing remarks made a great play on the fact that there was no intention of permanently depriving the Crown";

further, on that same page he

stated, in reference to the case of ***R. v. Fernandes*** (supra):

"The
court held that the intention of permanently depriving the owner of it applies where a person in possession or control of another's property, dishonestly and for his own purpose deals with that property in such a manner that he knows he is risking its loss";

and finally, at page 212, lines

31-32 the judge said:

"… and
that he had the intention of permanently depriving the Crown of those monies…".

[15]

We are of the opinion, that the

trial judge was explicitly clear that what was meant was "permanently deprived"

and not "fraudulently deprived" and the latter when said was merely a slip on

his part. This situation can clearly be

distinguished from that in ***R. v. Stanley***

and Knight [1993] Crim. L.R. 618, where the recorder repeatedly omitted

reference to a vital element of the offence.

Consequently, we find that there was no material irregularity committed by the trial judge.

Ground (a)(ii)

[16] Counsel for the appellant complained that the judge erred by illustrating the element of intent to permanently deprive the owner by reference to the case of ***R. v. Fernandes*** (supra)**.** He contended that the reference to the case attempts to illustrate by reference to a decided case the intention to permanently deprive the owner is inappropriate. There is no evidence, he stated, in the instant case that the appellant used the money borrowed for an investment or for speculative purposes.

To that extent, he submitted, the illustration is both misleading and inappropriate, and insofar as it touched directly on a defence issue it both denied the viability of the defence and may have robbed the appellant of the prospect of an acquittal.

[17] The trial judge directed the jury as follows (page 188):

> "There is a case of ***R. v. Fernandes***, not too long ago, 1996, where a lawyer, a solicitor, had transferred funds from his client's account to his bookkeeper, not his money, clients' account funds to a bookkeeper, for an investment in a firm of back street money lenders, of which his bookkeeper was a partner. The money disappeared. The lawyer was prosecuted and he argued that he did not intend permanently to deprive his clients of the money. That didn't wash with the court. The court held that the intention of permanently depriving the owner of it applies where a person in possession or control of another's property, dishonestly and for his own purpose deals with that property in such a manner that he knows he is risking its loss."

[18]

For the prosecution, Mrs. Babb-Agard, submitted that even if all of the prosecution evidence was disregarded, the appellant's unsworn statement was such that he could have been convicted on that basis alone. The appellant admitted, she said, that he had taken the money and his Counsel conceded that he had abused the office of Chief Marshal.

[19]

Mrs. Babb-Agard submitted that there is a well settled principle of law that a trial judge in a criminal trial should instruct the jury as to the relevant statute and case law and how the law should be applied to the facts of the case (see ***Fuller v The State (1995) 52 W.I.R 424***).

[20]

In support of the submissions on this ground Counsel referred the Court to ***section 7*** of the ***Theft Act*** which provides as follows:

> "(1) A person who appropriates property belonging to another without meaning the other permanently to lose the thing itself is nevertheless regarded as having the intention of permanently depriving the other of that property if his intention is to treat the thing as his own to dispose of regardless of the other's rights; and a borrowing or lending of the thing may amount to so treating it if, but only if, the borrowing or lending is for a period, and in circumstances that make it equivalent to an outright taking or disposal.
>
> (2) Without affecting or limiting subsection (1), where a person, having possession or control, whether lawfully or not, of property belonging to another, parts with that property under a condition as to its return which he may not be able to perform, this, if done for his own purposes, and without the other's authority amounts to treating the property as his own to dispose of regardless of the other's rights."

[21]

We conclude that the trial judge made no error in mentioning the case of ***Fernandes***. In fact he was well within his purview to cite a case which is applicable to an element of the offence for the benefit of the jury and the mention of ***Fernandes*** was in our view appropriate and could not have misled the jury.

Further, we are at a loss to understand how the mention of the ***Fernandes*** case could have denied the viability of the defence or robbed the appellant of the prospect of an acquittal, in light of the evidence that the appellant took the Crown's money for his own purposes.

Ground (a)(iii)

[22]

Counsel for the appellant submitted on this ground that the trial judge further erred by suggesting that the loss of benefit to the owner is part of the definition of theft. Counsel referred the Court to ***section 3(2)(i)*** of the ***Theft Act***, which states:

> "For the purposes of this section, it is immaterial whether the appropriation is made with a view to gain, or whether it is made for the thief's own benefit."

[23]

The passage of the trial judge's summation of which Counsel complains states, (pages 188-189):

> "I will go on to make one other comment in relation to this issue before I move on, Mr. Foreman and members of the jury.
> The evidence led in this court indicates that over a period of time monies were – I think the euphemism used was 'borrowed' and then they were somehow made good. However, between the period of 'borrow' and being made good, the Crown lost a benefit. They didn't have the benefit of using the money to help pay your salary or having interest on it."

[24]

Counsel for the appellant did not expand on this submission in his oral arguments, nor did Counsel for the respondent reply to the submission made. In any event, we will address this particular passage later in the judgment.

Ground (b)

[25]

Counsel for the appellant complained that the failure of the trial judge to break down and link each element of the offence to the relevant evidence in the case was a non-direction which constituted a misdirection in law.

[26]

Counsel contended that there was no illustrating of the tricky concepts of dishonest appropriation and intention to deprive permanently in the context of the evidence in the case. Counsel relied on ***R. v. Stanley and Knight*** *(supra)* ***R. v Cooper [1993] 78C.C.C (3d) 289 and R. Kinnear [2002] EWCA Crim 902.***

[27]

In ***Fuller v. The State*** *(supra)* **Ibrahim JA** said at page 433:

> "A trial judge's duty in summing up goes far beyond merely reading back the evidence and giving a formulaic exposition of the legal principles. What they require from the judge, in the final round is his assistance in identifying, applying and assessing the evidence in relation to each direction of law which the trial judge is required to give them and also in relation to the issues that arise for their determination…"

[28]

In the instant case, the trial judge summarised the evidence for the jury (page 187) and outlined the applicable law (pages 186-188) and while the issues of fact were identified, there was no explicit correlation made between the issues, the evidence presented, and the law. This may well have been because in essence, the facts of the case were largely unchallenged, especially given the unsworn statement made by the appellant and the cross-examination of the witnesses for the prosecution, and the final address by defence Counsel.

[29]

This was a fairly simple case with straightforward facts. The trial judge, in our view, explained the applicable law to the jury and addressed the issues. In a case such as this, we do not find that the failure of the judge to correlate the facts to the law constituted a misdirection in law. Thus we feel that the appellant was not prejudiced or disadvantaged by the way the judge summed-up the case to the jury.

Ground (c)

[30]

Counsel for the appellant submitted that the circumstances of this case called for a direction in accordance with that given in ***R. v. Hinks [2000] 4 All ER 833*** at 849 to the effect that even though the appellant's behaviour may be regarded as morally reprehensible that does not necessarily mean that it was dishonest.

[31]

Counsel contended that much evidence was led in the case that pointed to reprehensible behaviour or morally

blameworthy conduct on the part of the appellant. Some persons, for example, he said, may have regarded the appellant's borrowing from Government as distasteful. The fact, too, that he was head of department may be regarded as further evidence of reprehensible conduct insofar as he did not set a good example. To have issued a bounced cheque was further evidence of blameworthy conduct. His tardiness in honouring the deposited cheque and the fact that a fellow worker junior to him at one point used his own money to make good his indebtedness were all features of this case which may have been regarded by members of the jury, or some of them, as ugly and morally distasteful. Therefore, the trial judge, Counsel said, has a particular responsibility to give a ***Hinks direction*** and warn the jury against equating those aspects of the appellant's conduct with guilt and his failure to do so may well have prejudiced the appellant's prospect of both a fair trial and an acquittal.

[32]

It is important to point out that Counsel's point of view was expressed by **Lord Hutton** in his dissenting opinion in ***R v. Hinks,*** *(supra)*. However, in the earlier case of ***R. v. Ghosh [1982] 3 W.L.R. 110*** the view was expressed by **Lord Jane CJ** at pages 118 and 119 thus:

> "If we are right that dishonesty is something in the mind of the accused, … then if the mind of the accused is honest, it cannot be deemed dishonest merely because members of the jury would have regarded it as dishonest to embark on that course of conduct. So we would reject the simple uncomplicated approach that the test is purely objective, however attractive from the practical point of view that solution may be.
>
> …
>
> But if he is believed, or raises a real doubt about the matter, the jury cannot be sure that he was dishonest. In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts

or genuinely believes that he is morally justified in acting as he did."

[33]

The trial judge in his summation gave the jury the following direction (page 186):

> "In order to determine whether the accused acted dishonestly, you must first consider whether he acted dishonestly by the standards of ordinary and decent people. If you find that he so acted, then you will have to consider whether the accused himself must have realised what he was doing was by those standards, dishonest."

[34]

The trial judge then quoted the passage cited above to the jury. We are of the opinion that although the trial judge should have gone further and warned the jury in the manner suggested by **Sir Richard** we feel that in the circumstances of this case, the judge did give the jury the appropriate directions. Thus there is no merit in this ground.

Ground (d)

[35]

Counsel for the appellant complained that in the trial judge's summation, he made a prejudicial comment with respect to the number of times that the appellant, when questioned by Inspector Eversley, said "I have nothing to say" or "I don't wish to say anything".

[36]

The trial judge said (page 209):

"Counsel
for the Crown, who probably had more free time than I had, added up the number of times he said one thing or the other, but they would certainly run into double figures, one varying from the other, "I have nothing to say," "I don't wish to say anything," in respect of each and every allegation in respect of these cheques."

[37]

Sir

Richard submitted that the trial judge not only adopted as his own the highly prejudicial and gravely improper approach of the prosecutor but ignored and undermined the appellant's right to silence and his privilege against self-incrimination.

[38]

Counsel for the respondent stated that there was nothing prejudicial about the trial judge's summation on this point and maintained that what the judge said was wholly appropriate. She stated that the trial judge gave the required directions in respect of the burden of proof (pages 193, 194 and 212), the standard of proof (pages 189, 194, 195 and 212) and the presumption of innocence (page 193). He then dealt with the jury's function (pages 187, 189, 193, 194 and 196), the quality of the Crown's evidence (page 194) and reminded the jury that they were to resolve doubts in favour of the appellant (pages 194 and 213). The judge also outlined the defence's case and re-capped defence Counsel's closing arguments for the benefit of the jury (pages 211 and 212).

[39]

In our minds, it is clear from what appears in the trial record, that the summation of the trial judge included a summary of Inspector Eversley's testimony in which the judge stated (page 209):

"He
was given the right to use the telephone to consult with an attorney-at-law of

his choice and his evidence was: 'the accused requested to use the telephone and after using the telephone on numerous occasions, he made a statement to me'. These statements were recorded in the notebook to which no objection was taken. After he used the phone he said,
"I spoke to my attorney, Mr. Deighton Rawlins, and he has advised me not to give any statement." Then in respect of
each matter that was put to him by the officer, he either said, 'I do not wish to say anything' or 'I have nothing to say'."

[40]

It is a basic tenet in our
criminal justice system that a person under police questioning has the right to
remain silent, and in fact one of the requirements of the law is that the
police officer conducting the questioning should so advise the suspect. This right has been enshrined in our system
as ***rule***
2 of the ***Judges' Rules***, which is often referred to as such by officers.

[41]

What can be surmised from the
testimony of Inspector Eversley, recounted in the summation, is that at the
very least the appellant was acting on the directions of his Counsel not to
provide a statement to the police.

[42]

During her closing address,
Mrs. Babb-Agard for the prosecution made certain comments in this regard:

"Mr.
Foreman and your members, when the accused man was interviewed by Police Inspector Eversley, he gave certain oral statements. Those oral statements went into evidence unchallenged by the defence.
I am asking you to accept that those oral statements were
self-serving. Now, the accused man, as I
said, has absolutely nothing to prove.
He doesn't have to even say anything.
He doesn't have to make a statement, nothing. He can sit in the dock and be absolutely
silent and we will still have to prove the case against him. But let's go through the oral statements that he gave to Inspector Eversley.

…

> And
> throughout the investigation – I noted it – it might not be anything to you,
> but I noted it. He said, "I don't wish
> to say anything." He said it ten
> times. "I have nothing to say," he said
> it six times. That's his right.
>
> …
>
> "I
> don't have anything to say." You know
> why he had nothing to say? Poor man
> though, he didn't know Mr. Springer was saving the notes.
>
> …
>
> Anyhow,
> Mr. Foreman and your members, when asked for what purpose did the Court Process
> Office issue cheques drawn upon the Chief Marshal's account to him personally
> or the Legal Assistant, "I don't wish to answer that question." Those are the oral statements that he gave to
> the police that went in unchallenged by the defence and you can deal with those
> statements what you will. I know what I
> would do with them if I was a juror."

[43]

Clearly, the prosecution was

attempting to draw a negative inference in the minds of the jurors from the

appellant's exercise of his right to remain silent.

[44]

The appellant further contended

that the comments made by the trial judge and the prosecutor were in breach of ***section 76(1)*** of the ***Evidence Act, Cap. 121A,*** and might well have led the jury to

regard the appellant's responses to the police as behaviour indicative of

guilt, and was a serious misdirection in law.

Further, Counsel argued strongly that the appellant's constitutional

right to the protection of the law was violated.

[45]

Section 76(1)

provides as follows:

> "An inference unfavourable to a party may not be drawn from evidence that the party or some other person failed or refused to answer a question, or respond to a representation put or made to the person in the course of official questioning."

[46]

Conversely, it is important to note that Counsel for the defence at the trial had the opportunity to cross-examine Inspector Eversley and Sergeant Gittens, and could have asked either of them to elaborate on ***rule 2*** of the ***Judges' Rules***. In addition, in his closing address, Counsel made no reference to the appellant's right to remain silent and no comment or complaint on the Crown's closing submissions.

[47]

While, in our view, the trial judge should have gone further and directed the jury explicitly that the appellant was well within his rights to remain silent and provide the answers which he did, we find nothing disparaging or suggestive in his comments. He was merely outlining the evidence. We also do not find that he adopted the statements of the prosecutor as his own.

[48]

In fact, on a number of occasions, he reminded the jury that the burden of proof was on the prosecution and that the burden never shifted to the appellant. At page 193 of the record the trial judge said:

> "However, as I said earlier, the facts are your responsibility and you must decide from the evidence presented whether the prosecution has discharged the onus or burden of proof that the accused man committed the offences with which he is charged. The burden of proof rests with

the prosecution, and this burden never shifts to the accused, since every person charged with a criminal offence is presumed to be innocent until his guilt is proved by the prosecution. That is a fundamental principle of the criminal law. Therefore, if the accused is to be found guilty of this offence, the prosecution must prove his guilt. The accused has nothing to prove."

[49] In addition, with respect to inferences, the trial judge cautioned the jury as follows (at page 194):

"On the question of finding facts, you may draw inferences from the facts you find, provided always that those inferences flow logically and reasonably from the facts you find, and if two or more inferences may be drawn from the same set of facts, you must find the inference that is most favourable to the accused."

[50] Further, on page 196 the trial judge directed the jury as follows:

"Mr. Foreman and members of the jury, a number of oral statements were made by the accused to the police witnesses in this case, which were not challenged or objected to by Mr. Rawlins, his counsel. As judges of facts, you have this function to perform: In the context where the words were indeed spoken by the accused, you have to determine what the words mean. If you are of the opinion or finding that the words are capable of more than one meaning, then you must accept the meaning that is most favourable to the accused."

[51] Finally, at page 212 the trial judge said:

"You may conclude or infer that he said what he'd done because he thinks he has

nothing to disprove. The burden is on
the Crown and you must satisfy yourselves on the evidence led by the Crown of
his guilt. He has nothing to prove. He is innocent until proven guilty, and he
must be proven guilty only on the strength of the Crown's case. If you are not satisfied on the evidence led
by the prosecution of his guilt, you must find him not guilty. If you are in any doubt as to whether he be
innocent or guilty, you must find him not guilty, because the law provides that
the accused need not say anything."

[52]

Nevertheless, in the face of
the prosecutor's inappropriate comments, the trial judge should have given a
strong and explicit direction along the lines of ***section 76***. Not to do so, despite the directions given,
as outlined above, the jury may nonetheless, unfortunately, have been left with
the impression that the appellant's oral statements to the police were
indicative of his guilt, which would be of obvious prejudice and disadvantage
to the appellant. Therefore, there is
merit in this ground of appeal.

Grounds (e) - (g)

[53]

Counsel for the appellant
complains that by directing the jury that no evidence had been led by the
defence in circumstances in which the appellant made an unsworn statement, the
trial judge denied the evidential nature of the unsworn statement and
effectively withdrew the appellant's defence from the jury.

[54]

Counsel also complains that the
trial judge by further directing that the only evidence led in this case had
been led by the Crown, disregarded the defence's right in our adversarial
system to rely on evidence and/or inferences favourable to its case coming from
the prosecution witnesses.

[55]

Counsel further complains that the trial judge by directing the jury that there was no evidence of any other kind coming from any other source than from prosecution witnesses, made the summation unbalanced and unfair and thereby destroyed any likelihood of an acquittal.

[56]

Counsel for the respondent submitted that that part of the summation of the trial judge complained of must be considered in its context. This Court agrees.

[57]

In his summation, the trial judge said (pages 190-191):

> "Now, in his closing address, counsel for the defence made reference to the evidence led in this court, suggestibly *(sic)* led by him. No evidence has been led by the defence. An unsworn statement was made by the accused and that's it. The only evidence led in this court has been led by the Crown. So there is no evidence of any other kind coming from any other source than from prosecution witnesses."

[58]

Having reviewed the summation in its entirety, we find that placing this direction of the trial judge in its appropriate context reveals that the trial judge at that stage was discussing the submission of defence Counsel that only a portion of the monies appropriated by the appellant belonged to the Crown. In that context, the trial judge said (pages 190-191):

> "Mr.

Foreman and members of the jury, there are some areas of law that have been referred to in this trial that I think I should address at the outset. The defence is contending that by virtue of some provision of the ***Court Process Act*, Chapter 111(A)** of the laws of Barbados, monies received by that Government Department from suitors do not become and are not the property of the Government of Barbados. Further, that as a Marshal or Chief Marshal, they may be held liable under **section 57** of the Act, they are in a special position as public officers. In fact, the word used repeatedly by counsel for the defence is that the Chief Marshal had autonomy over the accounts of the Court Process Office.

Reliance has been placed on **section 10** of the ***Court Process Act*** to support the view that only the fees prescribed for seeking the assistance of the Process Office belong to the Consolidated Fund. If I may just detain you for a moment, **section 10** speaks to the fees which a Minister may prescribe for the administration of the Act and then subsection 2 says…

The Registrar in her evidence said that the Chief Marshal's office maintained a number of accounts. The monies received are to go into those accounts. The gravamen of the submission by counsel for the defence is that only those $30.00 or fees belong to the Crown, and that's all that could have been stolen.

So there is no evidence before you, Mr. Foreman and members of the jury, to say how much money was ever received by the Chief Marshal by way of fees. There is no evidence to say that those fees were of such a miniscule amount that they could not be the funds of the Government, to say that those $9,000 cheques or the two $450 cheques were not the Crown's, but in any event as I go on to say to you, that has no bearing." (Emphasis added.)

[59] Therefore, it becomes clear upon consideration of the entire passage that when the trial judge commented

that the "only evidence led in this court has been led by the Crown… there is no evidence of any other kind coming from any other source than from prosecution witnesses", he was referring solely to evidence led with respect to the quantum of money received by the Chief Marshal and the ownership of such money and not the evidence led in the trial as a whole. This is especially so in light of the fact that further in his summation, (page 210) when the judge directed his mind to the unsworn statement of the appellant (the evidence of the appellant), he repeated the statement for the jury.

Ground (h)

[60] The appellant further complains that the trial judge erred in law when he failed to assist the jury with an interpretation and analysis of the unsworn statement.
His submission was that essentially the comments of the trial judge would have led the jury to disregard the unsworn statement made by the appellant; that the judge denied any evidentiary value of the unsworn statement.

[61] The trial judge, in his summation said (page 210):

> "After Sergeant Gittens gave his evidence, the Crown closed its case. The accused was given his rights and elected to make an unsworn statement, and he is entitled to do that. The statement was made some three or four hours – I'm not sure, two hours ago, but this is what he said."

[62] Further, the trial judge said (page 212):

"Mr.
Foreman and members of the jury, in every criminal case you can only find the accused guilty of the offences if the evidence led by the Crown leaves you in absolutely no doubt. You must look to
the evidence of the Crown in order to find the accused guilty, and if you are not satisfied on the strength of that evidence, you must find him not guilty. So the fact that he has only
made an unsworn statement is not important as to his guilt or innocence."

[63]

Now, while Counsel for the
appellant complains that the above passage reinforces his argument that the comments of the trial judge were such that the jury was bound to view the unsworn statement as meaningless, our view is, that what the trial judge intended and meant, was that the fact that the statement made by the appellant was unsworn, as opposed to his giving evidence under oath, is irrelevant to a finding of guilt or innocence.

[64]

Counsel referred the Court to
the case of ***Shane Nurse v. R., Criminal Appeal No. 34 of 2004, (unreported decision of 22 February 2007)*** with respect to the evidentiary weight of unsworn statements and it is important to note that the instant case was determined prior to this Court's decision in ***Nurse.***

[65]

In effect, we agree with the
principles submitted by Counsel for the appellant that unsworn statements are clearly evidence pursuant to the statutory definition of evidence set out in ***section 2*** of the ***Evidence Act***. We further
agree that trial judges should treat unsworn statements in the same way as they treat sworn evidence.

[66]

Further, contrary to the

submissions made by Counsel for the appellant***, Nurse*** emphasized that in Barbados, we must not only consider the common law position, but also that of statute. ***Section 23(1)*** of the ***Evidence Act*** provides as follows:

> "In criminal proceedings, where an accused has given unsworn evidence and has not also given sworn evidence, the Judge or a party other than the prosecutor ***may comment on the fact that the accused did not give evidence***." (Emphasis added.)

[67]

The common law position, as elucidated in ***Nurse*** *(supra)* at paragraph [16], which is equally applicable in the circumstances of this case, is that "an unsworn statement from the dock has some value but its potential effect is persuasive rather than evidential. To the extent that it may influence the jury's decision, the trial judge should invite them to consider the statement in relation to the whole of the evidence". The judgment of **Sir David Simmons CJ** in ***Nurse*** discussed in detail the common law and statutory position regarding unsworn statements and we need not repeat the law here.

[68]

Finally, we do not find that the judge made any prejudicial statement about the unsworn statement given the context in which his comments were made. Although the judge failed to assist the jury with an interpretation and analysis of the unsworn statement this might well have been because in essence the statement was so simple that it could easily have been understood by the jury and really needed no interpretation or analysis.

Ground (i)(a)

[69]

Counsel for the appellant

further complained that the trial judge denied the defence, rather than put it

to the jury when he said (page 211):

> "Mr.
> Foreman and members of the jury, the accused in the statement which I have just read to you, referred to the practice before the Court Process Office and the Magistrate's Court which he availed himself of.
> ***That practice was not legal*** and years of doing something wrong does not make it right. This is not a case of acquiring property by default or through limitation as a squatter, by reason of no challenge to ownership, because the law, ***Limitation and Prescription Act***, provides for so-called wrong doing by inaction to be legitimated. It doesn't apply to dealing with other peoples' property." (Emphasis added.)

[70]

Counsel submitted that the

thrust of the defence was that this behaviour was a practice of officers in the

Magistrate's Court and the Court Process Office and that there was never the

intention to permanently deprive, that the intention was always to repay the

money, refuting both the elements of dishonest appropriation and intention of

permanently depriving the Government.

While the appellant never disputed that he had committed the act, the

characterisation of that act was still very much a live issue: "a borrowing" as

against "a dishonest appropriation". The

comments of the judge, Counsel contended, resolved this issue with finality.

[71]

Counsel argued that the

appellant was entitled to have his defence put however, weak or tenuous it

might have appeared to the trial judge.

The interests of a fair trial demanded that the trial judge discharge

his duty in assisting the jury in an analysis of an unsworn statement and its

implications and also in an analysis of all the inferences that could be drawn

from the prosecution witnesses that could have been favourable to the defence.

[72]

In support of his submissions

Counsel cited the case of ***Von Starck v. R. [2000]***

1 W.L.R 1270, where it was said in the Privy Council at

p.1275:

> "The
> judge is required to put to the jury for their consideration, in a fair and
> balanced manner the respective contentions which have been presented. But his responsibility does not end
> there. It is his responsibility not only
> to see that the trial is conducted with all due regard to the principle of
> fairness, but to place before the jury all the possible conclusions which may
> be open to them on the evidence which has been presented in the trial, whether
> or not they have all been canvassed by either of the parties in their
> submissions. It is the duty of the judge
> to secure that the overall interests of justice are served in the resolution of
> the matter and that the jury is enabled to reach a sound conclusion on the
> facts in light of a complete understanding of the law applicable to them. If the evidence is wholly incredible, or so
> tenuous or uncertain that no reasonable jury could reasonably accept it, then
> of course the judge is entitled to put it aside."

[73]

In our view, the trial judge

properly directed the jury that the practice of officers in the Magistrate's

Court and the Court Process Office, including the appellant, of borrowing money

from Government funds was not legal, even if they intended to repay it.

[74]

Section 3(1)

of the ***Theft Act*** defined the *mens*

rea required for an offence of theft as an intention permanently to deprive

the owner of the goods of them.

[75]

Section 7(1)

of the ***Act*** expands the definition in ***section 3*** by saying that

the necessary *mens rea* for **theft** may be there if the defendant's

intention is to treat the thing as his own to dispose of regardless of the

owner's rights, and that borrowing or lending may amount to **theft** if for a period and in such circumstances as to make it equivalent to an **outright taking** or disposal.
That must mean that a mere borrowing is never enough to constitute the necessary guilty mind unless the intention is to return the thing in such a changed state that it can be truly said that all its goodness has gone.

[76]

Turning now to Counsel's contention that there was never the intention of the appellant to permanently deprive the Government of money, but that there was always the intention of the appellant to repay the money the Court would refer to the case of ***R v Velumyl [1989] Crim.L.R. 299.***

[77]

In ***Velumyl,*** the appellant, who was employed in a managerial capacity, had taken £1,050 from a safe at work. He did so without authority and in breach of company rules. He said that he had lent the money to a friend on the Saturday preceding its removal and expected to return that sum on the following Monday.
During the interview, he declined to name the friend and agreed that he had no legal right to take the money, nor did he think that he had his employer's permission to do so. He further agreed that he had treated the money as if it were his own, and that he had acted dishonestly in acting as he had done.
Following arraignment, on a charge of theft, his counsel sought a preliminary ruling from the Judge as to whether the appellant would have a defence under the ***Theft Act 1968*** (other than on an issue of dishonesty) if he had intended to pay the money back.
Essentially, the submission was that one piece of money was as good as another and if there was an intention to repay the money, albeit not the exact notes or coins taken, then an essential ingredient of theft, namely the intention permanently to deprive the owner of the money, was missing. The Judge ruled against the appellant, who changed his plea to "guilty" and appealed on a point of law to the Court of Appeal. *Held*, dismissing the appeal, there had been an appropriation by the appellant's assumption of the rights of the owner of the money. He did have the

requisite intention of permanently depriving the owner of the money because he had no intention to return the objects which he had taken. His intention had been to return objects of equivalent value, which intention was relevant to the question of dishonest which was not in issue. It was not relevant to the question before the Judge. In their Lordships' judgment, such represented the law which view was supported by such academic writers as Glanville Williams (*Criminal Law* (2nd ed.) 710) and Smith and Hogan (*Criminal Law* (6th ed.) 530 and footnote 15). Three possible scenarios could be envisaged from the appellant's submission: (a) X took Y's money, dishonestly, with no intention of refunding it; that was clearly theft; (b) X took Y's money, again dishonestly, but with the intention of refunding a like amount; (c) X took Y's money, and not only intended to refund it but acted without any element of dishonesty, there being no moral obloquy attaching to his conduct, on the facts.

The appellant's submission on appeal was necessarily that both (b) and (c) fell outside the definition of theft because the ingredient of an intention to permanently deprive the owner of the money was lacking. No authority in support of such a contention had been cited, and there were many cases which implicitly assumed such to be ill-founded. For example, in *R. v. Feely* (1973) 57 Cr.App.R. 312, an appropriation in breach of the employer's instructions, but without moral obloquy attaching thereto, was said not to amount to theft. But the reason this was so was due to a lack of dishonesty, not to any want of intention to permanently deprive the owner. The point was that the person who had taken the money, albeit intending and reasonably expecting to replace it with an equivalent sum, committed the offence because he had taken something which he was not entitled to take without the consent of the owner and was, in effect, trying to force upon the owner a substitution to which the latter had not consented (*per* Winn L.J., *R. v. Cockburn* (1968) 52 Cr.App.R. 134). The Judge had acted correctly. Had it been suggested that there was any lack of dishonesty in the instant case, then the correct course would have been to leave the issue to the jury. However, the appellant had chosen not to do so and the plea of guilty had not been induced by any wrong decision of the Judge.

[78]

In the instant case the

appellant had taken Government's money without authority and in breach of the Financial Rules. He had no right to take the money nor did he have the Government's permission to do so. In law, there has been an appropriation by the appellant's assumption of the rights of the owner of the money. Therefore, he did have the requisite intention of permanently depriving Government of the money because he had no intention to return the objects which he had taken. His intention was to return objects of equivalent value. The question then arises as to whether the appropriation was dishonest. The first question under the test laid down in ***Gosh*** (*supra*) is, "Was what was done dishonest according to the ordinary standards of reasonable and honest people?" The arbiters of the standards of reasonable and honest people are the jury. Secondly, "Was the taking of Government's money which he was not entitled to take in the circumstances dishonest conduct?" The jury in this case, having been properly directed, by their unanimous verdicts indicated that they regarded the appellant's conduct as dishonest.

[79]

There is, therefore, no merit in this ground of appeal.

Grounds (i)(b) - (d)

[80]

Counsel for the appellant complained that the trial judge erred in law when he went outside the boundaries of permissible conduct and prejudiced the case against the appellant when he described at page 188 and again at page 203 the borrowing and repaying of monies in the Court Process Office over a period of time as a "euphemism". **Sir Richard** contended that the trial judge was suggesting to the jury that the appellant's use of the word "borrowing" was a polite term for stealing and that his use of words was a polite discrediting of the appellant's defence.

[81]

It is difficult to see how

Counsel complains of this comment on the part of the trial judge at the trial,

when during the cross-examination of Ms. Sandra Mason, Registrar of the Supreme

Court, it was Counsel for the defence at the trial who made the following

statements (pages 85 and 86):

> "By
> Mr. Rawlins: Madam Registrar, are you
> not familiar with the fact that from time to time employees in the Court
> Process Office borrow money from this fund?
>
> A. No, I am certainly not aware of that. I have never heard of it before.
>
> The
> Court: And you put "borrow" in quotes?
>
> Mr.
> Rawlins: Yes."

[82]

Counsel further complained that

the trial judge:

(a)

brought to the jury's attention the evidence of
Mr. Springer that some cheques were stale-dated for four months or longer and
that one had to be actually refreshed (page 189) without at the same time
indicating that this was not evidence of guilt and may have misled the jury
into weighing that fact against the appellant; and

(b)

in reminding the jury of the unsworn statement
of the appellant from the dock (page 210), broke the sentence "I also availed

myself of the practice" and added the comment "nice words" (lines 15-16). He stated that this trivialised and mocked
the appellant's statement creating the impression that the Tribunal had ceased
to be impartial.

[83]

Counsel for the appellant

referred the Court to three cases, namely ***Fraser Marr (1990) 90 Cr.App.R. 154, Mears***

v. R. (1993) 97 Cr.App.R.239 and ***R v. Farr (1999) Crim. Law Rep. 506.*** In ***Fraser Marr,*** the **Lord Chief Justice**

in delivering the

judgment of the Court said at page 156:

"The
nature of the defence was, to say the very best, most unimpressive. It is however, an inherent principle of our
system of trial that however distasteful the offence, however repulsive the
defendant, however laughable his defence, he is nevertheless entitled to have
his case fairly presented to the jury both by counsel and by the judge. Indeed, it is probably true to say that it is
just in those cases where the cards seem to be stacked most heavily against the
defendant that the judge should be most scrupulous to ensure that nothing
untoward takes place which exacerbate the defendant's difficulties."

[84]

In ***Farr,*** the Court of Appeal

held:

"This
summing up must have left the jury with a strong impression that the judge did
not believe the defendant and that impression would not have been dispelled by
the standard direction that the facts were for the jury not the judge. The question the court had to ask itself was
whether…the conviction was unsafe…In assessing a judge's conduct towards the
defendant at trial, the real issue is whether the correct balance of fairness
has been struck…The manner and tone of the statements must be considered, and
each case will depend very much on it own facts bearing in mind the cumulative
effect these matters have on the jury."

[85]

Counsel for the prosecution

submitted that the trial judge gave directions on how to deal with opinion

evidence when he stated (page 189):

> "Mr.
> Foreman and members of the jury, I must now give you directions as to the law
> which applies to this case. When I do
> so, you must follow those directions; accept those directions and follow
> them. It has always been your
> responsibility to judge the evidence and decide all of the relevant facts of
> this case, and when you come to consider your verdict, you and you alone must
> do that. You have to decide those
> matters which would enable you to say whether the charge laid against the accused
> has been proved beyond reasonable doubt.
> You do that by having regard to all the evidence given in this case and
> forming your own judgment about the witnesses and deciding which evidence is
> reliable and which evidence is not. The
> facts of this case are your responsibility.
> You have heard opinions expressed by me during this summation, but you
> are not bound to accept any opinion that is not yours.
>
> If I
> express my opinions on the facts, or if I emphasize any particular aspect of
> the evidence, do not adopt my opinion unless you agree with it. If I do not mention something that you
> think
> is important, you should give it your own due consideration and give it such
> weight as you think fit. Always remember
> that when it comes to the facts, it is your judgment alone that counts."

Consequently,

Counsel contended any statements made by the trial judge would not have been

prejudicial to the defence.

[86]

We are of the opinion having

carefully examined the record, the submissions of Counsel and the authorities

cited that none of the matters about which complaint is made undermined the

defence, denied the appellant a fair trial or went beyond the boundaries of

appropriate judicial conduct.

[87]

Counsel for the appellant
further submitted that the trial judge erred in law and prejudiced the case against the appellant by instructing the jury that "the Crown did not have the benefit of the money to help pay your salary…" (page 189).

[88]

He maintained that the trial
judge, by his comment, compromised the objectivity of the jury and may well have led public servants thereon to consider themselves or their relatives in the public service as victims or near so of the appellant's conduct.

[89]

Counsel for the respondent
conceded that this was an unfortunate comment by the trial judge, however, she said, taking the summation as a whole and the strong evidence presented by the prosecution, a jury properly directed could not have come to any other verdict. She was of the view that the
comment of the trial judge could not have so clouded the minds of the jurors that they could not see the evidence for what it was.

[90]

In our view, a person sitting
on a jury must be impartial and this suggestion to the jury could well have had the effect of making the alleged offence personal to them and as such may have compromised their impartiality. We agree
that it was an improper exhortation to the jury which may have interfered with their ability to deliberate free from extraneous considerations. There is merit in this ground of appeal.

Ground

(j)

[91]

Counsel for the appellant submitted that the trial judge erred in law when he dismissed the submission that the indictments were inaccurately drawn and invalid and did not reflect the evidence either at the preliminary inquiry or at the trial (page 143), which established that the monies in question were not owned by the Crown (pages 4-8) but rather belong to the suitors accounts. Counsel cited in support of his submissions the ***Court Process Act, Cap. 111A.*** Counsel for the prosecution responded (pages 12-13) citing ***section 4(2)*** of ***Indictment Act, Cap. 136.***

[92]

The trial judge ruled (pages 19-20) that "the powers of the Director of Public Prosecutions in relation to the preferment of indictments were to be excused from all other authority". In support, the trial judge referred to ***Archbold***, ***2006, p.119, paragraph 1-211*** which states:

> "It has been held that a court is not entitled to quash an indictment because an examination of the evidence leads to the conclusion that the Prosecution will fail. Also, where a count follows a committal charge the court is not entitled to look at the evidence to see whether or not there was evidence to justify the committal."

[93]

The judge then said that in his view this was a matter for the jury and having overruled Counsel's submission allowed the trial to proceed.

[94]

Counsel for the defence at the trial raised the same issue again in his no-case submission (pages 171-179) stating that the property was not that of the Crown but of the suitors for whom the money was collected. In reply, Mrs.

Babb-Agard for the respondent said that it is well known that monies paid to a Government department belong to the Government until they are re-allocated or distributed to their intended recipient.

[95] Again, the trial judge determined that the defence's submissions were without merit. The judge's view that the monies rightfully belonged to the Crown in right of the Government of Barbados, in our opinion, accords with the legal position.
Consequently, there is no substance in this ground of appeal.

Sentence

[96] There was no application for leave to appeal against sentence: ***section 3(3)(c)*** of the ***Criminal Appeal Act, Cap. 113A***. However, the Court of its own motion raised the issue of sentence for reasons which will become apparent.

[97] Counsel for the appellant submitted that with respect to the imposition of the fine, the trial judge did not conduct a means test and consequently the sentence was oppressive and was not imposed in accordance with law. The trial judge, he said, saw fit to impose a fine in the amount of $15,000.00 in addition to the other penalties imposed on the first count. Upon conviction for this offence, the appellant will suffer not only by having a criminal record, but will lose his pension and any other rights he may have under the ***Pensions Act, Cap. 25.***

[98] When imposing a fine, ***section 41(2) 4*** of the ***Penal System Reform Act, Cap. 139*** (***the Act***) provides that the sentencing judge

must conduct some inquiry as to the means of the convicted person in order to create some reasonable and rational basis for the imposition of the fine. ***Section 41(2) 4*** provides as follows:

> "41(2)
> 4. Where a fine is imposed, the court in fixing the amount of the fine must take into account, among other relevant considerations, the means of the offender so far as these are known to the court, regardless whether this will increase or reduce the amount of the fine."

[99]

While the offence of theft may in and of itself create a reasonable and rational basis for the imposition of a fine, this Court in the case of ***Marsha Coward v. Commissioner of Police, Magisterial Appeal No. 1 of 2007, (unreported decision of 28 September 2007)*** decided that ***section 41(2) 4*** of ***the Act*** has been interpreted to require that an inquiry into the means of the offender be made.

However, ***Coward*** was decided two years after the trial judge passed sentence on the appellant.

[100]

In ***Coward***, the magistrate imposed a fine of $200,000.00 in addition to two years' imprisonment following the appellant's plea of guilty to importation of cocaine. This Court quashed the fine as the record of appeal did not disclose that the magistrate as required by ***the Act*** investigated or took into account the appellant's means and her ability to pay the fine. Although the fine imposed in this case was much smaller than that in ***Coward*** and did not relate to a drug offence, the Court finds that the fine was imposed without any inquiry or evidential basis or due consideration of the appellant's means.

[101]

In relation to whether the suspended custodial sentence imposed by the trial judge was appropriate in the circumstances of this case, we have considered the submissions of Counsel and the case of ***R. v. Trevor Clark [1998] 2 Cr.App.R.(S.) 95***, which states at page 98, quoting ***R. v. John Barrick (1985) 7 Cr.App.R.(S.) 142:***

"***In general a term of immediate imprisonment is inevitable***, save in very exceptional circumstances or where the amount of money obtained is small. ***Despite the great punishment that offenders of this sort bring upon themselves, the Court should nevertheless pass a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence***. The sum involved is obviously not the only factor to be considered, but it may in many cases provide a useful guide. Where the amounts involved cannot be described as small but are less than £10,000 or thereabouts, terms of imprisonment ranging from the very short up to about eighteen months are appropriate. … Cases involving sums of between about £10,000 and £50,000 will merit a term of about two to three years' imprisonment. Where greater sums are involved, for example, those over £100,000, then a term of three and a half years to four and a half years would be justified…

The terms suggested are appropriate where the case is contested. In any case where a plea of guilty is entered however the court should give the appropriate discount. ***It will not usually be appropriate in cases of serious breach of trust to suspend any part of the sentence***. As already indicated, the circumstances of cases will vary almost infinitely.

The following are some of the matters to which the court will no doubt wish to pay regard in determining what the proper level of sentence should be: (i) the quality and degree of trust reposed in the offender including his rank; (ii) the period over which the fraud or the thefts have been perpetrated; (iii) the use to which the money or property dishonestly taken was put; (iv) the effect upon the victim; (v) the impact of the offences on the public and public confidence; (vi) the effect on fellow- employees or partners; (vii) the effect on the offender himself; (viii) his own history; (ix) those matters of mitigation special to himself such as illness; being placed under great strain by excessive responsibility or the like; where, as sometimes happens, there has been a long delay, say over two years, between his being confronted with his dishonesty by his professional body or the police and the start of his trial; finally, any help given by him to the police." (Emphasis added.)

[102]

In the ***Clark*** case, ***Clark*** used his position as bursar of a charitable body and treasurer of a local church to steal almost £400,000 from his employer and £29,000 from the church over the period of four years.

[103]

This case can be distinguished from the present case on the basis that ***Clark*** was stealing outright. He was living beyond his means and sought to finance his lifestyle by supplementing his income from the coffers of his employers. ***Clark*** was sentenced to four years imprisonment.

[104] Also, absent in this case are any of the mitigating factors which came into play in ***Clark.*** When challenged by the vicar and his employers, ***Clark*** readily made admissions, resigned and cooperated fully with the investigation. He repaid £120,000 having had to sell his house to raise these funds.

[105] Having regard to the criteria outlined in ***Barrick*** and ***Clark*** above, we consider that:

(a) the quality and degree of trust reposed in the appellant was such that he was the head of the Court Process Office, the highest ranking Marshal in his Department, and as stated by his counsel, he "had autonomy over the accounts";

(b) the first offence was committed in December of 1997 and the last in August of 2000, therefore the thefts were perpetrated over a three year period;

(c) neither this Court nor the court below has any information with respect to the use made of the money;

(d)

as the money was paid back, this could be considered a “victimless crime”. In addition, considering that these were public funds, the impact on public confidence would be most relevant;

(e)

given the status of the appellant in the community, public confidence would have had to be negatively impacted;

(f)

the effect on fellow employees or partners is not in issue in the case;

(g)

the appellant has suffered the loss of his employment, he has been suspended for a time on half-pay, but of late he has received no salary at all, he risks losing his pension and;

(h)

the appellant has a very positive history, he is very highly regarded in the community and many of those interviewed for the probation report expressed surprise and shock at his predicament. His Civil Service career began in 1969 and has continued uninterrupted; he has worked in the court system since 1970. His superiors and peers described him in very positive, even glowing terms. Most even addressed his honesty and integrity, which is at odds with the offence currently before the court. The probation report stated that “His impeccable record of service to his community, faithful and dedicated service to his employers and [being] an exemplary father to his children are traits seldom seen in a single individual in today’s world”;

(i)

the appellant in this case suffers from type 2
diabetes, which is controlled by diet.
In addition, he takes medication to control his cholesterol level;

(j)

with respect to delay, there has been a delay of
three years from the date of committal to the start of the appellant's trial
and another two years between the trial and the appeal;

(k)

finally, the appellant did not assist the police
in any way with their investigation, which is his right, but it must be taken
into account.

[106] We

also considered the case of ***R. v. Derrick O'Neale Millington,***

Criminal Appeal No. 24 of 2005, (extempore decision given on 21 May 2007)

in which the appellant, a 35 year old former Island Constable of nine years was
convicted of theft for stealing a pistol from the Shooting Range where he was a
trustee and member of the Rifle Association.
He was sentenced to five years' imprisonment, which sentence was
appealed and affirmed on appeal, subsequent to the imposition of sentence in
the instant case.

[107] ***Millington***

also had no prior allegations of dishonesty and no previous convictions. He was found guilty after a trial and in mitigation he expressed regret and remorse and stated that he had compromised his self worth and suffered embarrassment and the stigma of the criminal charge. He asked for the court's mercy and lenience. In the pre-sentence report, those interviewed expressed surprise at his involvement and noted his previously unmarred reputation. He was

also dismissed from his employment as a result of the offence.

[108] In affirming the sentence, **Sir David Simmons, CJ** noted that on the day of the appeal, the appellant expressed remorse and asked for leniency and mercy and pointed to his previous good character and that this incident should be regarded as a mistake. However, the Chief Justice agreed with the trial judge who viewed this as a serious offence "particularly as a firearm was involved" and because of "the proliferation of guns". A custodial sentence was therefore merited. He further noted that for persons sworn to be Island Constables, working for the security of this country, great are the responsibilities imposed on them. As an Island Constable for 9 or 10 years, he would have been expected to have learned some aspects of law over time.

[109] We find it helpful to quote some further words of **Lord Lane LCJ** in ***Barrick*** at ***page 145*** as follows:

> "The type of case with which we are concerned is where a person in a position of trust, for example, an accountant, solicitor [attorney-at-law], bank employee or postman, has used that privileged and trusted position to defraud his partners or clients or employers or the general public of sizeable sums of money. He will usually, as in this case, be a person of hitherto impeccable character. It is practically certain, again as in this case, that he will never offend again and, in the nature of things, he will never again in his life be able to secure similar employment with all that means in the shape of disgrace for himself and hardship for himself and also his family.
>
> It was not long ago that this type of offender might expect to receive a term of imprisonment of three or four years, and indeed a great deal more if the sums involved were substantial."

[110] We make the following observations on the sentence imposed in this case. We are of the opinion that the three year sentence of imprisonment, suspended for a like period and the 240 hours of community service was too lenient in the circumstances. We are also of the opinion that the fine, especially as it was imposed without any inquiry as to means, was inappropriate. Given the position that the appellant held in society and the length of time for which he held that position, the Court takes a serious view of this offence. The appellant was in a position of trust and used the funds at his disposal as if they were his own personal piggy bank. That was simply unacceptable. An immediate custodial sentence was not only merited but necessary.

[111] Nevertheless, this Court has no power to quash the sentence and impose a custodial sentence unless there is an appeal against sentence: ***section 14*** of the ***Criminal Appeal Act.*** The Court must have granted leave to appeal against sentence pursuant to an application for leave to appeal against sentence; an appeal must be "in being": ***Williams (Earl) v. The State (2005) 66 WIR 313*** at ***[7]***.

[112] In any event, the power to increase a sentence is one to be sparingly exercised and in accordance with established principles formulated by the Privy Council, including putting the appellant on notice that the appellate court is considering an increase in sentence: ***Oliver (Marco) v. R. (2007) 70 WIR 1*** at ***[16]*** and cited in ***Padmore v. R., Criminal Appeal No. 18 of 2005, (unreported decision given on 30 March 2007)*** at ***[17]***.

[113] For this Court to exercise its power to impose a more severe sentence than that passed by a judge or a magistrate there must be an appeal against sentence or an application made by the Director of Public Prosecutions for a review of sentence if it appears to the Director that the sentence has been "unduly

lenient": ***section 36B*** of the ***Criminal Appeal Act*** and ***Padmore*** at ***[14]***.

CONCLUSION

[114] On the whole, although we find that the trial judge failed to properly direct the jury with respect to the appellant's right to remain silent and as to how the unsworn evidence should be treated and that he made inappropriate comments, we are not satisfied that these blemishes rendered the convictions unsafe.

[115] We are satisfied that a jury considering the totality of the evidence against the appellant and properly directed would have inevitably convicted the appellant on the basis of the ample evidence presented by the prosecution. Consequently, we are persuaded that, if necessary, this is an appropriate case for the application of the *proviso* to ***section 4(1)*** of the ***Criminal Appeal Act***.

[116] The appeal is therefore dismissed and the convictions are affirmed.

Justice of Appeal

Justice of Appeal

Justice of Appeal