TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCRAP 2009/005

BETWEEN:

MAUREEN PETERS

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mde. Ola Mae Edwards — Justice of Appeal
The Hon. Mde. Janice George-Creque — Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal

Appearances:

Mr. William Hare for the appellant
Ms. Grace Henry-McKenzie (Acting Director of Public Prosecutions),
Ms. Tiffany Scatliffe (Senior Crown Counsel) and Ms. Leslie Ann Faulkner (Crown Counsel) for the respondent

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2010: May 19;
October 1.

Criminal Appeal – 8 counts of theft – 2 counts of false accounting – appeal against conviction – whether unsafe – whether the verdict of the jury in respect of count 1 of theft was perverse – inconsistent verdicts – logical inconsistency – no case submission – drawing of inferences – competing inferences – whether non-disclosure on the part of the crown would render the verdict unsafe – non-disclosure – prosecutorial misconduct – whether the crown failed to present its case fairly – fairness of trial – regulating questions from the jury – precedence in closing speech – s. 24 (i) Criminal Procedure Act – jury irregularity – appeal against sentencing – whether it was excessive or wrong in principle – aggravating and mitigating factors – whether the judge took those into consideration before passing sentence –

The appellant was indicted on 8 counts of theft and 2 counts of false accounting. She was convicted on the first count of theft and both counts of false accounting and was sentenced

to two years imprisonment on count 1 of theft and eighteen months imprisonment for each count of false accounting to run concurrently with the sentence of theft. Not guilty verdicts were returned on the other 7 counts of theft. The appellant appealed against her conviction and sentence. The prosecution's case is that the appellant who worked with Marine Insurance Office had been responsible for bookkeeping and accounts as well as depositing the premiums at the banks. After an audit was conducted it was discovered that during the period 2002 to 2004 several sums of money were missing and were never deposited at the bank or accounted for. The appellant denied that she had stolen any money. She advanced several grounds of appeal including that (1) her conviction was unsafe and unsatisfactory; (2) that the verdict of the jury in respect of count 1 of theft was perverse as having regard to the vice voce and documentary evidence there was no qualitative difference in relation to counts 1 to 8; (3) that it was perverse to convict her on count 10 of false accounting charges stated to have arisen in respect of her covering up the alleged thefts said to have occurred in 2004 having cleared her on the said thefts; (4) that the learned judge failed to accept a submission of no case to answer at the close of the prosecution's case; (5) there was serious and material non-disclosure on the part of the crown; (6) prosecutorial misconduct; that the trial was unfair, that the judge wrongly and without reason invited the jury to ask questions of the 1st prosecution witness at the close of counsel's questioning, that the judge invited the defence to give its closing arguments before the prosecution; (7) that the judge erred by taking an unduly deferential approach to the crown's witness affording greater credibility to such evidence; (8) and there were a number of irregularities by the jury. The appellant appealed against her conviction on the ground that is was manifestly excessive and wrong in principle.

Held: that the appeal against conviction and sentence is dismissed and the conviction and sentence are affirmed.

1. That the conviction could not be regarded as inconsistent or perverse and was not unsafe. The test for determining whether a conviction can stand is whether the verdict is safe. The appellant bears the burden of establishing that the conviction is unsafe. Where an appellant alleges logical inconsistency he has to persuade the Court of Appeal that the nature of the inconsistencies is such that the safety of the guilty verdict is put in doubt. The question will turn on the facts of the particular case. **R v Ashley Mote** [2007] EWCA Crim 3131. The appellant has to satisfy the court that no reasonable jury who had applied their minds properly to the facts of the case could have arrived at the conclusion. **R v Durant** [1972] 1 WLR 1612. In other words there is no rational explanation to justify the jury's conclusion. **R v Dhillon**. It does not inexorably follow that verdicts are logically inconsistent just because they all depended on the evidence of the same person. The existence of a commonality of factual issues relating to an offence does not begin to establish that the verdicts are inconsistent. The correct approach is to consider whether the directions given to the jury were correct and, if so, to ask whether on those directions the verdicts are logically consistent.

   R v Dhillon (Sukhbir) [2010] EWCA Crim 1577 applied.
   R v B&Q Plc [2005] EWCA Crim 2297 applied.

2. Apart from the first count, the amounts averred in all the other counts were at variance with the amounts revealed on the evidence; it is therefore conceivable that this may have led the jury finding the way they did. Assuming that there was a logical inconsistency, a satisfactory explanation exists for the jury's findings on the different counts.

3. For the court to quash the conviction on count 10 the appellant must show that there is a logical inconsistency between the conviction on that count and the acquittal on counts 6, 7 and 8, and that there is no sensible explanation for it. The jury's verdict demonstrated that they were sure of the guilt of the accused as it was open to them on the evidence to find her guilty. Further, apart from the element of "dishonesty" the ingredients of theft and false accounting differ. Therefore there is no logical inconsistency or perversity in the verdict.

4. That there was evidence on which the jury could properly come to a conclusion that the appellant was guilty. In deciding on a submission of no case at the end of the evidence adduced by the prosecution, the correct approach would be to ask whether a reasonable jury, properly directed, could on that evidence find the charge in question proved beyond reasonable doubt. On the evidence adduced by the prosecution the jury were entitled to draw the inference that since the appellant was responsible for the deposit of funds and the keeping of the books, in circumstances whereby funds were missing, she had dishonestly appropriated the money. Given the factual matrix the correct approach would be to ask whether a reasonable jury properly directed would be entitled to draw an adverse inference. The correct test is the conventional test of what a reasonable jury would be entitled to conclude. In the circumstances the trial judge did not err in leaving the case to the jury.

   R v Jabber [2000] EWCA Crim 2694 applied.
   R v Shippey [1988] Crim LR 767 distinguished.

5. The law as to the duty of disclosure is now reasonably well settled. The law requires the crown to disclose to the defence any material of which it is aware which would tend either to materially weaken the crown's case or materially strengthen the case for the defence. Non-disclosure by itself does not automatically lead to the conclusion that a trial is unfair. The significance and consequences of the non-disclosure must be assessed. The test that should be applied is whether taking all the circumstances of the trial into account, there is a real possibility that the jury would have arrived at a different verdict. The non-disclosure, taken by itself did not affect the safety of the appellant's conviction and did not deny the appellant the real possibility of securing a different outcome. The undisclosed material would have made no difference to the outcome of the trial as similar cheques were tendered by the appellant. It was open to the jury to infer that the appellant had in fact stolen money from MIO and that the personal cheques of the appellant made out to MIO was for the repayment of money stolen. It stands to reason that the four non-

disclosed cheques had they been tendered into evidence may have strengthened the inference that the appellant had stolen the money.

Mc Innes v Her Majesty's Advocate (Rev 1) (Scotland) [2010] UKSC 7 at paragraph 20 applied.

6. That the closing speech of the prosecution had not reached the threshold which would lead the court to conclude that the trial was unfair and that the conviction should be quashed. The closing speech was in keeping with the evidence, was accurate on the facts and not prejudicial to the appellant.

7. That the overriding requirement that the accused be fairly tried was not compromised. The comment ascribed to the judge by the appellant's counsel to the effect that "you've got your client and she's got hers" is not illustrative or demonstrative of a lack of appreciation of the respective roles of counsel in a criminal trial.

8. That it is well established practice in the courts of the Eastern Caribbean for the trial judge to invite the jury to ask questions of witnesses. The foreman of the jury should forward the questions in writing to the judge who would decide whether the question is a proper one for the witness to answer. The questions asked of the witness by the jury sought clarification of an initial on an exhibit produced by him and was not of a nature as to affect the fairness of the trial.

   R v Barnes [1990] 155 JP 417 applied.

9. That the judge wrongly directed counsel for the defendant to give his closing speech before counsel for the crown. However absent this irregularity a reasonable jury would have brought back the same verdict.

10. That the separation of one of the jurors from the jury bailiff was not so fundamental as to vitiate the entire proceedings. There is no evidence that the jury was subject to any external influence in coming to its verdict or that they were rushed in their deliberations. The majority verdicts on the false accounting counts were delivered after two hours had passed, in keeping with the provisions of s. 35 of the **Jury Act**. Further the jury irregularities were not so material as to go to the root of the case. It is impossible to say that every irregularity is sufficient to quash a conviction.

    Simon Christopher Alexander [1974] 58 CR. App. R 295, R **v Wallace and others** [1990] Crim. LR 433 and **Edward Maggs** [1990] 91 Cr. App. R. 244 applied.

11. That the sentence was not manifestly excessive or wrong in principle, it was not passed on a wrong factual basis, relevant matters were considered, irrelevant matters were not considered and the sentence was justified in law.

JUDGMENT

[1] **BAPTISTE, J.A.:** Maureen Peters was tried on an indictment containing eight counts of theft and two counts of false accounting. By a majority of 7 to 2 Ms. Peters was convicted on the first count of theft and both counts of false accounting. Not guilty verdicts were returned in respect of the other counts of theft. A sentencing hearing was held and she was sentenced to two years imprisonment on the theft count and eighteen months imprisonment for each count of false accounting to run concurrently with the sentence for theft. Ms. Peters was also ordered to pay compensation of $8,221.00 within six months of completing her sentence, in default of payment she would serve a further term of six months. Ms. Peters has appealed her conviction and sentence.

Factual Background

[2] Before delving into the grounds of appeal it is necessary to state the background facts. Ms. Peters was employed at the Marine Insurance Office ("MIO") and was responsible for bookkeeping and accounts in the office. Ms. Peters was primarily responsible for the deposit of premiums collected by MIO on behalf of Insurance Underwriters. MIO held two bank accounts, one at Scotia Bank and the other at First Caribbean International Bank. The premiums which were deposited would go to the account at Scotia Bank and the First Caribbean account was used for depositing commission which was paid to MIO. The First Caribbean account was known as the operation account.

[3] When premiums were collected from customers, there was a standard practice of issuing a handwritten receipt to customers. Also, where several receipts were issued for premiums collected, an aggregate receipt would subsequently be completed reflecting the total of the several receipts and the total amount to be lodged. This amount was also entered in a manual log which also reflected the dates on which the lodgments were made.

[4] Pursuant to an audit conducted at MIO it was discovered that several amounts on various aggregate receipts spanning the period 2002 to 2004 were missing in that these sums were never deposited in any of the bank accounts held by MIO, and were never accounted for. During the year 2004, Ms. Peters failed to properly compile the aggregate receipt by omitting relevant information which was used for accounting purposes. When recording cheques she would inflate the cheque amount and decrease the cash amount, thereby wrongly recording the actual amount received in cash and cheques. Ms. Peters also embarked on a practice of back-dating deposits. She would apply the money she received from current receipts written by MIO to old receipts. On one occasion she deposited her salary cheque without withdrawing the corresponding amount.

[5] The respondent submitted that on the evidence led by its witness Mr. Maroney, it was made clear to the jury that although on the face of it, it would appear that the deposits, particularly in May 2002 equaled or exceeded the amounts collected for that month, there was no evidence that any of the money collected in May 2002 was deposited in that month. In fact the sums which were deposited in May 2002 related to funds which were collected prior to May 2002. Mr. Maroney's evidence was that the sums alleged to have been missing in May were never accounted for anywhere through the period May 2002 to 2005, when he concluded his audit. The conclusion was that the funds in relation to Count 1, that is the funds collected in May 2002 and the other months in question were missing. Ms. Peters denied that she had stolen any money.

Grounds of Appeal

[6] Several grounds of appeal were advanced on behalf of Ms. Peters. Ground 1 alleges that the verdict of the jury in respect of that count was perverse. Mr. Hare, counsel for Ms. Peters, argued that the Crown's case in respect of count 1 was in no material way different to that in respect of counts 2 to 8. Having regard to the vice voce and documentary evidence there was no qualitative difference in relation to counts 1 to 8. Mr. Hare submitted that if on the evidence the jury was not

satisfied of guilt in respect of counts 2 to 8 then it was perverse to convict in respect of count 1 on effectively the same evidence, accordingly, the conviction is unsafe and unsatisfactory.

[7] Mrs. Henry-McKenzie, submitted that the verdicts in relation to counts 1 to 8 were not inconsistent, therefore the convictions are safe and ought not to be disturbed. Mrs. Henry-McKenzie cited **R v Small**[1], paragraph 8, where the court stated that "a verdict will not be quashed on grounds of inconsistency with another verdict by the same jury unless they are logically inconsistent with each other".

Logical Inconsistency

[8] The substance of ground 1 of the appeal is that the conviction is unsafe as the verdict returned by the jury is inconsistent and therefore perverse. The legal principles governing inconsistent verdicts are well established. The test for determining whether a conviction can stand is whether the verdict is safe. The appellant carries the burden of establishing that the conviction is unsafe. Thus in **R v Ashley Mote**[2] Lord Phillips said at paragraph 30:

> "… The burden is on the appellant to persuade the Court of Appeal that the verdict is unsafe. Where he seeks to do so by showing that acquittals on some counts are inconsistent with convictions on others, he has to persuade the court that the nature of the inconsistencies is such that the safety of the guilty verdicts are put in doubt. That question will turn on the facts of the particular case and it is not safe to formulate a universal test."

[9] An appeal based on inconsistent verdicts cannot and will not get off the ground unless there is first, a logical inconsistency between the verdicts returned by the jury: Rose LJ in **R v Rafferty and Rafferty**[3]. As to what amounts to a logical inconsistency, guidance is obtained from the case of **R v Durante**[4] in which the court approved and adopted the following passage from the judgment of Devlin J in the unreported case of **R v Stone**, as a correct statement of the law:

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[1] [2006] EWCA Crim 495
[2] [2007] EWCA Crim 3131
[3] [2004] Crim 968
[4] [1972] 1 WLR 1612

> "when an appellant seeks to persuade this Court as to his ground of appeal that the jury has returned repugnant or inconsistent verdicts the burden is primarily on him. He must satisfy the court that the verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their minds properly to the facts in the case could have arrived at the conclusion, and once one assumes that they were an unreasonable jury or that they could not have reasonably come to the conclusion, then the conviction cannot stand. But the burden is on the defence to establish that."

[10] In **R v Cross**[5] Toulson LJ said at paragraph 39 that verdicts would be inconsistent where:

> "they cannot plausibly be explained by any line of reasoning which the jury could have adopted looking at the evidence as fair minded ordinary people. The appellate court has to apply this test in the context of the issues which were presented to the jury, but that does not of course mean that a jury had to view the evidence bearing on those issues in the way that was argued for either by the prosecution or the defence."

[11] In **R v Dhillon**[6] in addressing the issue of logical inconsistency, the court stated at paragraph 38: "In other words, there is no rational explanation to justify the jury's conclusion." The court went on to observe that "since the facts are within the purview of the jury and they do not reveal them, it must follow that if the apparently inconsistent verdicts could be explained by findings of fact which were properly open to the jury on the evidence, even if they might appear to be surprising findings, then no successful appeal could be maintained."

[12] In **Dhillon,** after a review of the authorities the following principles were encapsulated by the court at paragraph 33. The test for determining whether a conviction can stand is the statutory test whether the verdict is safe. The burden of establishing that the verdict is unsafe lies on the appellant. Where it is alleged that the verdict is unsafe because of inconsistent verdicts, a logical inconsistency between the verdicts is a necessary condition to a finding that the conviction is unsafe, but it is not a sufficient condition. Even where there is a logical inconsistency, a conviction may be safe if the court finds that there is an

[5] [2009] EWCA Crim 1553
[6] [2010] EWCA Crim. 1577

explanation for the inconsistency. It is only in the absence of any such explanation that the court is entitled to conclude that the jury must have been confused or adopted the wrong approach, with the consequence that the conviction should be quashed. Each case turns on its own facts and no universal test can be formulated.

[13] I adopt and apply these principles to the facts of this case. Has the appellant established that the verdicts are logically inconsistent or perverse? It does not inexorably follow that verdicts are logically inconsistent just because they all depended on the evidence of the same person. The existence of a commonality of factual issues relating to an offence does not begin to establish that the verdicts are inconsistent. The correct approach is to consider whether the directions given to the jury were correct and, if so, to ask whether, on those directions the verdicts are logically consistent: **R v B&Q PLC**[7], paragraph 20. The judge gave a conventional direction to the jury. She directed the jury to consider the case against and for the defendant on each of the counts separately on its merits and return a separate verdict on each count having focused on each separately and having formed a separate decision on each count. It was for the jury to consider in respect of counts 1 to 8 whether the appellant was guilty, taking into account the directions the judge gave and on the evidence relating to each count. The jury could well be sure of count one (as they were) while not being sure of the other counts of theft. I discern no inconsistency in the verdicts of the jury.

[14] In her skeleton arguments Mrs. Henry-McKenzie, acting Director of Public Prosecutions, explained how or why the jury could have returned different verdicts on the theft counts. Mrs. Henry-McKenzie pointed out that discrepancies existed in the amounts alleged in the indictment to have been stolen and the amount stolen as disclosed on the evidence during the trial. Apart from the first count, the amounts averred in all the other counts were at variance with the amounts revealed on the evidence. It is therefore conceivable that this may have led the

[7] [2005] EWCA Crim. 2297

jury finding the way they did. To my mind there is a plausible explanation for the different verdicts. Assuming that there was a logical inconsistency, a satisfactory explanation exists for the jury's findings on the different counts.

[15] It is interesting to note that after the jury retired they passed a note to the judge indicating the guilt of the defendant with respect to counts 9 and 10 (false accounting) but their lack of agreement as to how much cash was taken in relation to counts 1 to 8. The judge proceeded to give directions on the issue of "approximation" in relation to the theft charges. It is noted that all the theft charges spoke to an approximate amount stolen. A fair minded jury having regard to the evidence before them could reasonably have found the appellant guilty of count 1 and not guilty of counts 2 to 8. The jury may have felt insufficiently sure of counts 2 to 8 while being sure of count 1. Having found the appellant guilty of count 1, it was not perverse to have found her not guilty of the other counts of theft.

[16] The verdict could not be regarded as inconsistent or perverse and the conviction was not unsafe. Ground 1 of the appeal accordingly fails.

Ground 2

[17] This ground alleges that in summing up in respect of the counts of false accounting, the learned judge directed the jury that it could convict if it felt that the defendant had falsified the records of MIO by omitting details from the receipt books to cover up her thefts. Having acquitted the defendant of the alleged thefts said to have occurred in 2004, however, it was perverse to convict her on count 10 of false accounting charges stated to have arisen in respect of her covering up the said thefts. It also follows from Ground 1 that if the conviction in respect of count 1 is set aside, then the conviction in respect of count 9 is similarly unsafe and unsatisfactory.

[18] The judge's directions in respect of false accounting have to be looked at as a whole. The judge explained to the jury the elements of false accounting. The judge told the jury that if a material particular is omitted from an account or other

document to be used for the purpose of an account this would be treated as falsifying the account or document. The judge directed the jury that they would have to determine whether the defendant omitted to fill out the aggregate receipt, whether she falsified a document and whether the document is made for accounting purposes. If they so found, they would have to determine whether she acted dishonestly. The judge directed the jury that it was not just acting dishonestly, but, acting dishonestly with a purpose, that is, with a view to gain for herself or to cause loss to MIO.

[19] Count 10 (false accounting) encompassed the period 1st March 2004 to 31st December 2004. It spanned a wider period than the three theft counts (6, 7 and 8) that related to the year 2004. Count 6 covered the period 3rd March 2004 to 30th March 2004, count 7 related to the period 18th November 2004 to 30th November 2004, and count 8 embraced the period 7th December 2004 to 14th December 2004.

[20] For the court to quash the conviction on count 10 the appellant must show that there is a logical inconsistency between the conviction on that count and the acquittal on counts 6, 7 and 8, and there is no sensible explanation for it. The prosecution would have to make the jury feel sure in relation to the various elements of false accounting (count 10). Apart from the element of dishonesty the ingredients of theft and false accounting differ. The jury's verdict demonstrated that they were sure of the guilt of the accused. There is no logical inconsistency or perversity in the verdict. It was open to the jury on the evidence to find the appellant guilty.

[21] I see no inconsistency in the jury finding the appellant not guilty of specific counts of theft relating to a specific time period and approximate sums of money and guilty of false accounting relating to a period larger than but including the specified periods covered by the theft counts. Ground 2 accordingly fails.

Ground 3

[22] The learned judge erred in failing to accede to the defendant's submissions at the close of the prosecution's case that there was no case to answer.

[23] Mr. Hare argued that the learned judge should have acceded to the submission given that:

(1) the case had been unambiguously put on the basis that actual premium money and cheques in respect of the periods covered in the indictment (and especially in relation to count one) were missing; in fact the aggregate sums banked by MIO during every period covered in the indictment were approximately equal to (or in some cases greater than) the aggregate sums of the receipts for the corresponding periods. In respect of count one this was at a time when the premium money was paid into the segregated premium account, and the fact that there was no aggregate short fall in this account's deposits for the corresponding time, meant that the Crown's case was inherently unlikely at least in the period covered by count 1 of the indictment;

(2) in respect of premiums for which receipts had previously been written and against which the currently received money was applied in the defendant's bookkeeping, the manger of MIO had conceded in his evidence that the defendant's practice of applying current received premium receipts must have been sanctioned or agreed by Bermuda, the head office. In failing to have any sufficient regard to that evidence from the crown, the judge failed to take in consideration the weaker aspects of the crown's own case; in other words she over-relied on the purported plums and disregarded the duff;

(3) the learned judge failed to have any or adequate regard for the fact that, if indeed there had been thefts, as alleged or at all, there was ample evidence that, although the defendant was the one primarily

responsible for banking the premiums received from customers, there were others in the MIO office who had the opportunity to remove cash from the cash box, and that since there was no evidence adduced that the defendant had stolen money, any "inference" which the crown had invited the jury to draw was not ineluctable and certainly insufficient in the circumstances to found a criminal conviction.

No case submission

[24] Mrs. Henry-McKenzie submitted that the judge was correct in ruling that there was a case to answer on all counts of the indictment and that there was sufficient evidence upon which a reasonable jury properly directed would be entitled to come to a verdict of guilt.

[25] The basic rule in deciding on a submission of no case at the end of the evidence adduced by the prosecution is that the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond reasonable doubt. Per Lord Carswell in **Direction of Public Prosecutions v Varlack**[8] at paragraph 21. After describing the above rule as the canonical statement of the law found in the judgment of Lord Lane in **R v Galbraith**[9], Lord Carswell observed that the underlying principle that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the judge is equally applicable in cases concerned with the drawing of inferences.

Competing Inferences

[26] The present ground is also concerned with the question of competing inferences. What is the function of the judge in considering a no case submission in cases concerned with the drawing of inferences? The answer comes from the judgment of King CJ in the **Supreme Court of South Australia in Questions of Law**

[8] (British Virgin Island) [2008] UKPC
[9] [1981] 1 WLR 1039, 1042

Reserved on Acquittal (No. 2 of 1993) (1993) 61 SASR 1, 5 in a passage quoted by the Privy Council in **Director of Public Prosecutions v Varlack**, at paragraph 22, as an accurate statement of the law. King CJ stated that:

> "… It is not the function of the judge in considering a submission of no case to choose between inferences which are reasonably open to the jury. He must decide upon the basis that the jury will draw such of the inferences which are reasonably open, as are most favourable to the prosecution. It is not his concern that any verdict of guilt might be set aside by the Court of Criminal Appeal as unsafe. Neither is it any part of his function to decide whether any possible hypotheses consistent with innocence are reasonably open on the evidence. He is concerned only with whether a reasonable mind could reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence."

King CJ summarized the position as follows:

> "If there is direct evidence which is capable of proving the charge there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be. If the case depends upon circumstantial evidence, and that evidence, if accepted, is capable of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is capable of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence."

[27] In **Varlack** the Privy Council quoted a similar statement from the case of **R v Jabber**[10] where Moses LJ said at paragraph 21:

> "The correct approach is to ask whether a reasonable jury, properly directed, would be entitled to draw an adverse inference. To draw an adverse inference from a combination of factual circumstances necessarily does involve the rejection of all realistic possibilities consistent with innocence. But that is not the same as saying that anyone considering those circumstances would be bound to reach the same conclusion. This is not an appropriate test for a judge to apply on the

[10] [2000] EWCA Crim 2694

> submission of no case. The correct test is the conventional test of what a reasonable jury would be entitled to conclude."

[28] Mrs. Henry-McKenzie submitted and I agree, that on the evidence elicited by the prosecution, the jury were clearly entitled to draw the inference that since Mrs. Peter was responsible for the deposit of funds and the keeping of the books, in circumstances whereby funds to be deposited were missing, she had dishonestly appropriated the money. Significantly, the two other persons who worked in the MIO office gave evidence that they had not taken any of the money and had nothing to do with the deposit of the missing funds. Given the factual matrix, the correct approach as stated in **R v Jabbar** would be to ask whether a reasonable jury, properly directed would be entitled to draw an adverse inference. The correct test is the conventional test of what a reasonable jury would be entitled to conclude. In the circumstances, the trial judge did not err in leaving the case to the jury.

[29] In making the "plums and duff" submission, Mr. Hare undoubtedly had in mind **R v Shippey**[11]. **Shippey** is often resorted to by defence counsel when making a submission of no case. In **Shippey**, Turner J held that the requirement to take the crown evidence at its highest did not mean "picking out all the plums and leaving the duff behind." **Shippey** was put in context in **R v Pryer Sparks and Walker**[12] in which Hooper LJ deprecated resort to the "plums and duff principle." Hooper LJ pointed out that **Shippey** was a case which depended almost entirely on the evidence of a single complainant whose evidence suffered from internal contradictions and inconsistencies. He treated it as a decision on its facts, and not establishing any principle of law. His Lordship observed at paragraph 27 that:

> "It has been the experience of at least two members of this court that Shippey is often cited by counsel at the close of the prosecution's case. What counsel often do is to convert Shippey from what it actually is, namely, a decision on the facts, into a decision on the law; [Counsel] seek to find in Shippey… some principle of Law called the "plums and duff principle".

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[11] [1988] Crim LR 767
[12] [2004] EWCA (Crim) 1663

At paragraph 28 Hooper LJ reminded that when a submission of no case is made at the close of the prosecution's case, the task the trial judge has to perform is stated simply and clearly in **R v Galbraith**[13]:

> "could a reasonable jury properly directed be sure of the defendant's guilt on the charge which he faces."

Hooper LJ observed at paragraph 29 that in resolving that question help may sometimes be found in the case of **Shippey** provided it is remembered that **Shippey** is no more than another case on the facts.

[30] In the instant case there was evidence on which the jury could properly come to a conclusion that the appellant was guilty. The judge was therefore correct in allowing the matter to be tried by the jury. In the premises ground 3 of the appeal accordingly fails.

Ground 4

[31] Ground 4 alleges serious and material non-disclosure on the part of the Royal Virgin Islands Police of Investigations as to whether (i) allegedly stolen cheques had been presented for payment and (ii) investigations of a search conducted at Ms. Peter's home during which items were removed including evidence of repayments which had been made by Ms. Peters to MIO for small loans, (whether authorized or not) cheques which had occurred before Ms. Peters could have been aware of even the internal MIO investigation.

Ground 5

[32] This ground alleges that the Director of Public Prosecutions was and is equally guilty of serious and material non-disclosure of the same information and material in this case if and to the extent that the witness Detective Constable Jason Harford was correct in that the police had provided the information regarding the

[13] [1981] 73 Cr. App. R 124

investigations referred to in Ground 4 to the Director of Public Prosecutions' office. This non-disclosure rendered the trial unfair.

Ground 6

[33] The learned judge erred in failing to recognize the severity of the non-disclosure, holding that the prejudice was balanced out by the fact that the defendant "was there" when her home was searched, and could have given her counsel instructions on the same. In so doing, the learned judge failed to recognize:

(1) that this observation could not also be true of the bank investigations;

(2) that the fact that the defendant may have been present was irrelevant to the crown's duty to disclose the said material;

(3) that the fact that the defendant may have been present did not mean that she had any or sufficient information as to what was being removed from her home, or that she was in a position to give any instructions to her counsel about it;

(4) that the crown's evidence, used or unused, should come to the defendant's lawyers from the crown, and not the defendant.

Non disclosure

[34] Grounds 4, 5 and 6 will be considered together as they allege serious and material non-disclosure on the part of the crown. In her skeleton submissions Mrs. Henry-McKenzie stated that the respondent did not disclose a number of cheques, four of which were made out to MIO signed by the appellant, as the respondent was unaware of their existence. Unknown to the respondent the cheques were actually in its possession. Mrs. Henry-McKenzie submitted that the majority of the cheques not disclosed had nothing to do with the case and would not have been relevant and admissible in evidence. Further, the four personal cheques of Ms. Peters made out to MIO would not have affected the outcome of the case. In

developing that argument Mrs. Henry-McKenzie asked the question; why would Ms. Peters be paying money to MIO? Mrs. Henry-McKenzie observed that two similar cheques were tendered by Ms. Peters at the trial. Ms. Peters did not give evidence or call witnesses. No explanation was therefore offered by Ms. Peters as to why these cheques were tendered. It was the prosecution's case however, that Ms. Peters was repaying money to MIO for sums she had stolen. Mrs. Henry-McKenzie submitted that Ms. Peters would not have been prejudiced by these cheques not having being tendered. Further, Ms. Peters would have benefitted from this material not having been placed before the jury.

[35] The law as to the duty of disclosure is now reasonably well settled. The law requires the crown to disclose to the defence any material of which it is aware which would tend either to materially weaken the crown's case or materially strengthen the case for the defence. Non-disclosure by itself does not automatically lead to the conclusion that a trial is unfair. As was stated by the Supreme Court of the United Kingdom in **Mc Innes v Her Majesty's Advocate (Rev 1) (Scotland)**[14] [at paragraph 20]:

> "The significance and consequences of the non-disclosure must be assessed. The question at the stage of an appeal is whether given that there was a failure to disclose and having regard to what actually happened at the trial, the trial was nevertheless fair … as a consequence there was no miscarriage of justice … The test that should be applied is whether, taking all the circumstances of the trial into account, there is real possibility that the jury would have arrived at a different verdict."

[36] After taking full account of all the circumstances of the trial including the undisclosed cheques the question is, should the jury's verdict be allowed to stand? As stated in **Mc Inness** at paragraph 24, that question will be answered negatively if there was a real possibility of a different outcome.

[37] I am of the view that the undisclosed material would have made no difference to the outcome of the trial. In coming to that conclusion I recognize that similar cheques were tendered by the appellant. It was the prosecution's case that the

[14] [2010] UKSC 7

appellant was repaying money to MIO for sums she had stolen. It was open to the jury to infer that the appellant had in fact stolen money from MIO and that the personal cheques of the appellant made out to MIO was for the repayment of money stolen. As Mrs. Henry-McKenzie submitted and I agree, it stands to reason therefore that had the four non disclosed cheques been tendered into evidence, this may have strengthened the inference that the appellant had stolen. This assumes more weight in light of the fact that the similar cheques were tendered in evidence by the defence and the appellant was still convicted. It appears that any potential assistance the undisclosed material would have given the defence would be greatly outweighed by the assistance it would have given the prosecution's case. The non-disclosure, taken by itself, did not affect the safety of the appellant's conviction. I do not in the circumstances of this case regard the non-disclosure as having denied the appellant the real possibility of securing a different outcome. This ground of appeal accordingly fails.

Ground 7 - Prosecutorial misconduct

[38] This ground alleges that the prosecution repeatedly failed in their duty of fair presentation of their case, rendering the trial unfair. In support of that ground Mr. Hare alleges that the closing speech was riddled with inaccuracies, exaggeration, non-sequiturs, and comment designed to prejudice the defendant in the eyes of the jury but which was not properly grounded in fact or law.

[39] Mrs. Henry-McKenzie contended that the prosecution fairly presented their case to the jury and the closing speech was in keeping with the evidence, was accurate on the facts and not in any way prejudicial to the appellant.

[40] In **Randall v R**[15] **[2002] UKPC 19** at paragraph 10, the Privy Council addressed the issues of prosecutorial misconduct and the fairness of a trial. The Board pointed out that throughout any trial an overriding requirement is to ensure that the defendant is fairly tried. To that end a number of rules were developed to ensure

[15] [2002] UKPC 19

that the proceedings were conducted in an orderly and fair manner. These rules speak to the duty of the prosecuting counsel and also recognize the central role of the jury in a criminal trial. The duty of a prosecuting counsel is not to obtain a conviction at all costs, but to act as a minister of justice. The Board recognized that the central task of the jury was to decide whether the guilt of the defendant was established to the requisite standard and that the jury's attention must never be distracted from that central task.

[41] The Board deprecated bullying, intimidation, personal vilification, insult or the exchange of insults between counsel. There can never by any justification for such conduct. The Board recognized that counsel's duty may require a strong and direct challenge to a witness' evidence and strong criticism may properly be made of a witness or a defendant as long as that criticism is based on the evidence or the absence of evidence before the court. Further, reference should never be made to matters which may be prejudicial to a defendant but which are not before the court. At paragraph 28 the Board observed that it is not every departure from good practice which renders a trial unfair, but the right of a criminal defendant to a fair trial is absolute. At what point would departure from good practice compel a conclusion that the trial was unfair and lead to a quashing of a conviction? The Board stated that if the departure from good practice is so gross or so persistent, or so prejudicial or so irremediable, an appellate court will have no choice but to hold that the trial was unfair and quash the conviction.

[42] The closing speech of the prosecution has not reached the threshold which would lead the court to conclude that the trial was unfair and that the conviction should be quashed. The prosecution has not failed in its duty to present its case fairly. I agree with Mrs. Henry-McKenzie that the prosecution fairly presented the case to the jury and the closing speech was in keeping with the evidence, was accurate on the facts and not prejudicial to the appellant. In the circumstances this ground of appeal fails.

Ground 8 - Fairness of trial

[43] Ground 8 alleges that the trial judge failed to ensure the fairness of the trial process. There are six limbs to that ground. Before examining the different limbs it is useful to refer to **Randall v R** paragraph 10(3). There, the Board stated that it was the responsibility of a trial judge to ensure that proceedings are conducted in an orderly and proper manner which is fair to both the prosecution and defence. The trial judge must not be partisan nor must he appear to be partisan. If counsel begins to misbehave the judge must at once exert his authority to require the observance of accepted standards of conduct.

[44] Ground 8(i) alleges that the judge failed adequately or at all to control or heed the obviously excessive way in which the prosecution put their case and or wrongly indulged the prosecution in its errors. Ground 8(ii) alleges that the judge failed adequately or at all to question the crown as to why they had misstated the nature of their case and to seek any clarification when it became apparent that this was so. These limbs of ground 8 could easily be subsumed within Ground 7 which alleged failure on the part of the prosecution to present their case fairly to the jury, thus rendering the trial unfair. For the reasons stated in Ground 7, Grounds 8(i) and (ii) likewise fail.

[45] Ground 8(v) alleges that the judge failed properly to appreciate the very different roles of defending and prosecuting counsel in criminal trials, and in particular the crown's duty of fair presentation; evidencing such erroneous lack of proper appreciation when concerns were raised with comments to the defendant's counsel to the effect that "you've got your client and she's got hers".

[46] When Ground 7 was considered the issue of fair presentation was dealt with. The court held that the prosecution did not fail in its duty to present the case fairly, thus that ground failed. To the extent that Ground 8(v) seeks to revisit the issue of fair presentation, that ground also fails. Further, I do not find any basis for the allegation that the learned judge failed to properly appreciate the very different roles of defending and prosecuting counsel in criminal trials.

[47] In **Randall v R**, paragraph 9 the Privy Council stated the different objects of the parties in a criminal trial. The Board stated at paragraph 9:

> "A contested criminal trial on indictment is adversarial in character. The prosecution seeks to satisfy the jury of the guilt of the accused beyond reasonable doubt. The defence seeks to resist and rebut such proof. The objects of the parties are fundamentally opposed. There may well be disputes concerning the relevance and admissibility of evidence. There will almost always be a conflict of evidence. Some witnesses may be impugned as unreliable, others perhaps as dishonest. Witnesses on both sides may be accused of exaggerating or even fabricating their evidence. Defendants may choose to act in an obstructive and evasive manner. Opposing counsel may find each other easy to work with or they may not. It is not unusual for tempers to become frayed or relations strained."

At paragraph 10 the Board noted that throughout any trial one overriding requirement is to ensure that the defendant is fairly tried. The Board pointed out that the adversarial format of the criminal trial is directed to ensure a fair opportunity for the prosecution to establish guilt and a fair opportunity for the defendant to advance his defence.

[48] The learned trial judge conducted the proceedings in a manner which was fair to both the prosecution and the defence. The judge manifestly appreciated the different roles of the prosecution and the defence. The comment ascribed to the judge by the appellant's counsel to the effect that "you've got your client and she's got hers" is not illustrative or demonstrative of a lack of appreciation of the respective roles of counsel in a criminal trial. The overriding requirement that the accused be fairly tried has not been compromised. Ground 8(v) of the appeal accordingly fails.

[49] Ground 8(vi) alleges that the judge failed to appreciate the severity of the non-disclosure by the crown, in particular in relation to the bank investigations and the search of the defendant's home. The issue of non-disclosure was dealt with in grounds 4 and 5. For the reasons stated when the court addressed those grounds, ground 8(vi) also fails.

[50] Ground 8(iii) states that the judge wrongly and without any reason invited the jury to ask questions of the first prosecution witness at the close of counsel's questioning (which was subsequently recognized as an error, but which will or may have left the jury wondering why their earlier and wrongly granted invitation was no longer extended).

Questions from jury

[51] In **R V Barnes**[16] at the end of the defendant's evidence, the judge invited the jury to ask questions. On appeal, the court stated:

> "As to inviting the jury to ask questions, we have to say that generally speaking we deprecate that as a practice. The jury is not familiar with the rules of evidence. If this were to become a practice the jury might ask embarrassing questions that cannot be answered. We speculated what would have happened in a case where a defendant had substantial previous convictions if in response to an invitation such as was extended here the jury had come back into court and wanted to know something of the previous history of the defendant. It would have been difficult to deal with that sort of question. So we are satisfied that what the judge did here was a dangerous practice which should not be encouraged."

The court however recognized that no material irregularity had occurred.

[52] It is a well established practice in the courts of the Eastern Caribbean for the trial judge to invite the jury to ask questions of witnesses. There may be a time during the giving of evidence when the jury is unclear about a particular matter and would like clarification from the witness. Seeking clarification would not be inconsistent with their role as judges of facts. In light of the concerns raised in **Barnes** this court recommends that for the future the existing practice could easily be remedied by the foremen of the jury forwarding the questions in writing to the judge, who being familiar with the rules of evidence would decide whether the question is a proper one for the witness to answer.

[53] In the present case the learned trial judge clarified the position with respect to the asking of questions by the jury. The judge told the jury that:

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[16] [1990] 155 JP 417

> "in relation to questions from now on, in relation to any questions you might have for the witness … they have to be in relation to evidence that the witness has given on which you are not sure in terms of he said something which might have confused you, you need to clarify … So essentially, you will write the questions … pass the questions up to me."

No exception is taken to this clarification by the learned judge. The question is when the jury asked the witness questions directly did this operate to the prejudice of the appellant? Mrs. Henry-McKenzie submitted, and I agree, that the court should consider the nature of the question posed to the witness by the jury and whether they were such as to render the trial unfair. The questions asked of the witness (Mr. Woolhouse) by the jury sought clarification of an initial on an exhibit produced by him. They were not of a nature as to affect the fairness of the trial. Accordingly Ground 8(iii) fails.

Ground 8(iv) - Precedence in closing speech

[54] This ground states that the learned judge wrongly directed counsel for the defendant to give his closing speech before counsel for the crown.

[55] Section 24(i) of the **Criminal Procedure Act**[17] provides:

> "Upon any trial, the addresses to the jury shall be regulated as follows: the counsel for the prosecution, in the event of the defendant or his counsel, not announcing, at the close of the case for the prosecution, his intention to adduce, shall be allowed to address the jury a second time at the close of such case, for the purpose of summing up the evidence; and the accused or his counsel, shall then be allowed to open his case, and also to sum up the evidence, if any be adduced for the defence, and the right to reply shall be in accordance with the practice of the Courts of England."

[56] No counsel advised the court as to the practice in England pertaining to the right to reply by the crown. Mrs. Henry-McKenzie however referred to **Director of Public Prosecutions Reference No 1 of 1980**[18] where the court ruled that the prosecution has a right to reply and that such a right should not be interfered with,

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[17] CAP 18 of the Virgin Islands
[18] (1980) 29 WIR 94

and that the prosecution has the right to have the last word. From the outset I must point out that this particular position is supported by section 149 of the **Criminal Law (Procedure) Act of Guyana** which provided that counsel for the state shall in all cases have the right to reply. This cannot be used as an authority to support the argument that the crown in the Virgin Islands has the right to reply, the right to have the last word.

[57] In **Director of Public Prosecution's Reference No. 1 of 1980**, reference was made to the **Criminal Procedure (Right of Reply) Act 1964** of the United Kingdom. That Act amended the law relating to the prosecution's right of reply at trials on indictment. Its effect was to ensure that the defence has the right to the last speech in all trials on indictment. Section 1 of the Act states:

> "(1) Upon the trial of any person on indictment –
>
> (a) the prosecution shall not be entitled to the right of reply on the ground only that the Attorney General or the Solicitor General appears for the Crown at the trial; and
>
> (b) the time at which the prosecution is entitled to exercise that right shall, notwithstanding anything in section 2 of the Criminal Procedure Act 1865, be after the close of the evidence for the defence and before the closing speech (if any) by or on behalf of the accused."

[58] It seems therefore that an irregularity occurred when the judge directed the counsel for the defence to give his closing speech before counsel for the prosecution. What is the effect of this irregularity? Does it render the conviction unsafe? If the irregularity had not occurred, would a reasonable jury necessarily and inevitably have brought in a verdict of guilty? I am of the view that absent the irregularity the jury would inevitably have brought the same verdict. I do not therefore find the conviction to be unsafe. The prosecution referred to the evidence supportive of the charges against the appellant and the inferences which could be drawn. No specific matter has been pointed out by the appellant which would render the verdict unsafe by reason only of the prosecution addressing last.

Ground 9

[59] The learned judge erred by taking an unduly deferential approach to the crown's witness, and in particular DC Jason Harford and Christopher Maroney, the effect of which was to give their evidence (and the crown's case) the impression of a greater credibility than was due in the circumstances.

[60] The learned judge dealt fairly and properly with the evidence of DC Jason Harford and Mr. Maroney. As pointed out by Mrs. Henry-McKenzie, the learned judge outlined the evidence of Mr. Harford in the interview under caution he conducted with the appellant. The appellant said in her caution interview "I did not take the amount of money they said I take." The judge pointed this out in her summation and also that this statement was not challenged by the defence. The judge also outlined the appellant's explanations when the allegations were put to her. The judge pointed out to the jury that the appellant had made both incriminating and non-incriminating statements in her caution statement and interview. The judge directed the jury to consider the whole statement to determine the truth and the weight to be placed on the explanations. The judge directed the jury as to how to treat the evidence of Mr. Maroney, both as an expert witness and an ordinary witness. I find no merit in this ground.

Ground 10 - Jury irregularity

[61] This ground alleges that the trial was rendered unfair by various irregularities regarding the jury and/or there is sufficient cause for concern about the propriety of the jury's decision-making process for reasons including:

(1) Evidence that the jury was either listened to or spoken to by a police officer after having retired:

(a) A police officer stated to defence counsel that the jury required a calculator;

(b) A police officer stated that one of the jurors was "pissed off and wanted to get the boat to [Virgin Gorda] at 6.30";

(c) The same police officer stated to the Crown Counsel that this was not important because that juror had already made up her mind.

(2) At 3 p.m. a note was received saying that the jury considered the defendant guilty of false accounting but could not decide on the theft. This was before any majority direction had been given; yet the verdicts on the false accounting were by 7:2 majorities.

(3) The learned judge erred in failing at the time of sending the jury out, to indicate that if they sat late that those who did not live on Tortola would be provided with transport home to other islands if there were no ferries.

[62] Apart from the bald assertions made by the appellant no evidence has been presented by the appellant to substantiate the allegations raised in this ground. That, to my mind, would be sufficient to dispose of this ground. The respondent however was given leave to rely on the affidavit of PC Huggins, in so far as the facts pertinent to paragraphs (a), (b) and (c) above are concerned. The respondent submits that these irregularities are not material and ought not to lead to the quashing of the convictions. To this end the dictum of Lord Goddard C.J. **R v Furlong**[19] is instructive. His Lordship stated:

> "It is impossible to say that every irregularity is a ground for quashing a conviction. It may and not infrequently does happen that something is done in the course of a trial which is not strictly in accordance with recognized procedure. If that is so, then the Court must consider whether or not it is an irregularity which goes to the root of the case."

[63] The question which therefore arises for consideration by the court is whether the irregularities as complained of where so material as to go to the root of the case

[19] 1950 34 Cr. App. R79

and lead to the quashing of the conviction. The general principle is that the jury may not, when they have retired to consider the verdict, be given any additional evidence or material to assist them.[20]. The respondent submits however, that the fact that the jury upon the request of the foreman was provided with a calculator during their retirement, is not a material irregularity. It does not go to the root of the case. In support of that submission, the respondent places reliance on the case of **R v Wallace and others**[21]. In that case the usher supplied the jury upon their request with a dictionary without the knowledge of the Judge. The jury wanted clarification on the meaning of "grievous bodily harm". The Court of Appeal held that it was an irregularity but in the circumstances, not a material irregularity such as to lead to the quashing of the convictions.

[64] Similarly, in the case of **Edward Maggs**[22]. The appellant was charged with causing death by reckless driving. The jury upon retirement requested to borrow a tape measure. They were provided with a police surveyor's tape. The appellant was convicted and appealed on the ground that a material irregularity had occurred in the course of the trial. The Court of Appeal held, dismissing the appeal, that although no fresh evidence could be given to a jury after they retired, nor could equipment enabling them to conduct experiments with exhibits, the jury required the tape measure to see what the measurements on the plan, being expressed in meters looked like in real life. Accordingly no material irregularity had occurred in the trial. The respondent therefore argues that what occurred in the instant case with respect to the calculator is not a material irregularity going to the root of the case. I agree.

[65] The case against the appellant concerned a large amount of figures. The assumption can be made that the calculator was to assist the jury in calculating the figures and not for experimenting. In the chronology of events as outlined in the affidavit of PC Huggins, it was learned counsel for the appellant who upon the request of the police unwittingly provided the calculator without informing the court

[20] Davis (1975) 62 Crim. App. R 194 pg 201 per Widgery C.J.)
[21] [1991] Crim LR 433
[22] [1990] 91 Cr. App. R 244

or even counsel for the prosecution at the time of so doing. The respondent properly submitted, and I agree, that the conviction ought not be disturbed on account of this irregularity.

[66] The appellant also complains in this ground about remarks that a police officer purportedly said was made by a juror, to indicate that the jury was either listened to or spoken to during the course of their deliberation. In the affidavit of P.C. Huggins upon which the respondent relies for the facts, surrounding this incident, it was said that the juror in question left the jury room and went into the corridor where she made certain remarks. This raises the issue of the separation of the juror from the other jurors whilst in the process of deliberation, and the effect, if any that this would have on the proceedings.

[67] The general principle governing this area of the law, is that once the jury has been put in the charge of the jury bailiffs for the purpose of retirement to consider their verdict, that jury should not be allowed to separate from each other and from the jury bailiffs. The question which arises is whether in the circumstances of this case where the juror was separated from the other jurors, this constitutes an irregularity which is so grave as to warrant the quashing of the conviction.

[68] The respondent submits that it is not, and relies on the case of **Simon Christopher Alexander**[23] in support of this proposition. Briefly, the facts in **Alexander** are that upon retirement, one juror unaccompanied by a jury bailiff returned into court to collect an exhibit which he required. No one spoke to him. The judge was informed and no application was made to discharge the jury. The appellant was convicted. The Court of Appeal held that though the separation of the juror from his fellow jurors and the jury bailiff was an irregularity, it was not an irregularity which went to the root of the matter and affected the trial. The conviction was affirmed.

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[23] [1974] 58 Cr. App. R 295

[69] In the present case, the juror although separated from the other jurors, was always in the presence of the police officers in whose charge the jury was placed. Although it is said that she made certain remarks, there is no indication that the police officers communicated with her other than to tell her to return to the jury room. There is no indication that the juror communicated with any one else. In my judgment this breach was not so fundamental as to vitiate the entire proceedings. There is no evidence which indicates that the jury was subject to any external influence in coming to its verdict or that they were rushed in their deliberations. Further, although the jurors had sent a note indicating that they considered the appellant guilty of False Accounting Counts before a majority direction was given, this point is without merit as the majority verdicts on the False Accounting Counts were delivered after two hours had passed, in keeping with the provisions of section 35 of **the Jury Act**, of the Virgin Islands.

[70] The appellant argues that the learned judge erred in failing at the time the jury was about to retire to indicate that those who did not live on Tortola would be provided with transportation home to the other islands if there were no ferries. The respondent submits and I agree that the law imposes no obligation on the learned trial judge to so indicate. There is no indication that the jurors were rushed in arriving at their verdict or that this had any bearing on their deliberations.

Ground 11 - Sentencing

[71] In her appeal against sentence the appellant alleges that in passing sentence, the learned judge erred in:

(1) allowing the prosecution a right of reply to a plea of mitigation on matters not raised in that plea;

(2) relying on an unsubstantiated (and the defence say untrue) suggestion by Senior Counsel that thefts from employers were on the increase in the Territory, and purporting to see the need for a particular example to be made of the defendant in order to deter others;

(3) passing a sentence that was manifestly excessive in light of the fact that the defendant had no previous convictions and the offence for which she was convicted was vastly different from the array of offences for which she was charged, and in so doing gave the impression that the defendant was being sentenced for charges of which she had been acquitted.

[72] The penalty for theft under the **Criminal Code 1997** is ten years imprisonment (s. 209(b). The court in passing sentence took into account all the relevant factors including the aggravating and mitigating factors. Aggravating factors were breach of trust and no restitution was made to MIO. The mitigating factors were that the appellant was a first time offender and was of previous good character.

[73] After the allocutus was put to the appellant her counsel mitigated on her behalf. The crown outlined the sentencing guidelines to the court and the aggravating and mitigating factors of the case. The crown also made reference to similar local authorities and English authorities. The respondent submits that based on the facts, as accepted by the jury, in this particular case, the learned judge was correct in practice and law to allow the crown to outline the aggravating and mitigating factors of the case during the sentencing hearing. I find nothing wrong with the approach of the learned judge. Any assistance from counsel in arriving at an appropriate sentence is always welcome.

[74] In **Newsome and Browne**[24] it was explained that the Court of Appeal will only interfere with a sentence passed if: it is not justified by law; it is passed on the wrong factual basis; some matter has been improperly taken into account; or where it was wrong in principle or manifestly excessive. The Appeal Court will not interfere with the discretion of the sentencing court merely on the ground that it might have passed a different sentence.

[24] [1970] 2 QB 711, 54 Cr. App. R 485

[75] In **R v De Weever**[25] Mr. Justice Sweeney stated at paragraph 11:

> "In our view, in accordance with the guidelines on theft, the primary factor in considering sentences is the seriousness of the offence which is determined by assessing the culpability of the offender and any harm which the offence caused, was intended to cause, or might foreseeable have caused … As theft is an offence of dishonesty the offender is to be regarded as having a high level of culpability, albeit that the precise level of that culpability will vary according to factors such as motivation, whether the offence was planned or spontaneous and so forth …"

Although this was said in the context of sentencing guidelines for the offence of theft from the person, I find it most appropriate to the case at hand.

[76] Mrs. Henry-McKenzie stated that the court had regard to the following factors in considering sentence:

(1) the quality and degree of trust that was instilled in the appellant;

(2) the period over which the thefts were committed;

(3) the use to which the money was put;

(4) the effect on the victim;

(5) the impact of the offence on the public/public confidence in the victim;

(6) the effect on fellow employees;

(7) the effect on the offender and the appellant's history and

(8) other matters specific to the offender e.g. illness.

In taking these factors into consideration, the court found that the appellant was in breach of the trust that her employer reposed in her. The court rightfully considered that there was no restitution made to the virtual complainant to the time of sentencing. The court noted the loss of customer confidence in Marine Insurance Company. The learned judge did mention that these offences seemed to be on the increase or if not, they are being more easily detected. The court made reference and took into consideration that the appellant has no previous convictions of any sort. The learned judge expounded from the onset in her sentencing that:

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[25] [2009] EWCA Crim 803

> "the Court's stance is to impose a just sentence, having regard to all the circumstances of the case of the offender, and to the aims of sentencing which in the main are punishment, rehabilitation and deterrence".

As part of the sentencing process, the court also took judicial notice of the prevalence of offences of this nature in the Territory and also took into account the effect upon the victims and the society in general. In the circumstances of this case I find no merit in the complaints made by the appellant in ground 11(i), (ii) and (iii).

[77] The appellant also complained in Ground 11(iv) that the court passed a sentence of immediate imprisonment when:

(1) the offence was not one for which no sentence other than custody was appropriate; and/or

(2) the defendant had exceptionally strong personal mitigating factors relating to herself that would have justified either a non-custodial sentence and/or the suspending of any sentence, and in particular:

(a) the defendant was a single mother with no previous convictions who was in full time employment;

(b) that the defendant's son was a minor who lived alone with his mother;

(c) that the defendant was blind in one eye;

(3) wrongly holding that the defendant did not consider herself handicapped by having lost the sight of one eye, when there was no evidence to support this assertion;

(4) failing to have regard to the effect of the fact of the conviction on the defendant's employment prospects within a small jurisdiction;

(5) failing to have any or sufficient regard for the effect of the sentence on the defendant's son;

(6) passing a sentence that was manifestly excessive and therefore wrong in principle.

[78] The appellant submits that the defendant had exceptionally strong personal mitigating factors relating to herself that would justify either a non-custodial sentence or a suspended sentence. The respondent submits that the learned judge took into consideration these personal circumstances during sentencing. I agree that the learned judge took into account all relevant personal circumstances of the appellant in imposing sentence.

[79] In the circumstances the court finds no justification for disturbing the sentence that was imposed. The sentence was not manifestly excessive or wrong in principle, it was not passed on a wrong factual basis, relevant matters were considered, irrelevant matters were not considered and the sentence was justified in law. The appeal against sentence accordingly fails.

[80] In conclusion, the appeal against conviction and sentence is dismissed and the conviction and sentence are affirmed.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Janice George-Creque
Justice of Appeal