BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

MAGISTERIAL CRIMINAL APPEALS NOs.1 & 2 OF 2002

BETWEEN:

LUDWIS ALLEN WHEATLEY
WESLEY PENN

Appellants

and

THE COMMISSIONER OF POLICE

Respondent

Before:

The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Adrian D. Saunders	Justice of Appeal
The Hon. Mr. Brian Alleyne	Justice of Appeal

Appearances:

Mr. J. Archibald QC with Mr. O. Ramjeet and Ms. A. Smith for the Appellants
Mr. T. Williams with Ms. O. Reid for the Crown

2003: September 30
October 1, 2
2004 January 12

JUDGMENT

[1] SAUNDERS, J.A.: These appeals arise from a criminal trial before Magistrate Gail Charles. A total of ten charges were preferred against Ludwis Allen Wheatley and Wesley Penn. The charges were grouped under three different sections of the British Virgin Islands (BVI) Criminal Code. There were four charges of theft, two charges of fraud and breach of trust, and four charges that I shall conveniently describe as having to do with conflict of interest on the part of a public officer.

[2] The case was not a simple one. It commenced on the 26th June, 2002 and concluded on the 17th January, 2003. The accused Wheatley is the Financial Secretary of the BVI. Penn is a local building contractor. The witnesses testifying included, for the Prosecution, the Acting Governor and, for the Defence, the then Chief Minister. In all, some 26 witnesses testified for the Prosecution. The record of the proceedings consumes 34 volumes of typed transcript. The learned Magistrate did a commendable job in managing and trying what must have been a long and difficult case.

[3] At the close of the case for the Prosecution, a no case submission was made in respect of all the charges. The Magistrate upheld the submissions in relation to the fraud and breach of trust charges. The matter proceeded on the charges having to do with conflict of interest and with theft. Upon the conclusion of the trial, the Magistrate acquitted the accused of all the theft charges but found both men guilty of the offences having to do with conflict of interest. Wheatley was sentenced to a five month term of imprisonment. Penn was sentenced to three months. The men have appealed their convictions and sentences. The Prosecution have appealed the dismissal of the theft charges.

A brief background to the charges

[4] Later in this judgment, as I examine the specific charges, I will outline in greater detail the facts giving rise to the prosecution of the accused. At this stage however, I shall content myself with a brief background.

[5] In December, 2001 during heavy rains, a retaining wall in the village of Long Look collapsed. The wall abutted the land of Ms. Alice Thomas. Dr. Pickering, the Legislative Council Representative for the area, assessed that, in light of the collapsed wall, a danger was posed “to life and home”. He arranged to have the Chief Minister urgently approve, as a special project, the re-building of the wall.

[6] The firms of P&W Heavy Equipment and Accurate Construction were contracted to perform the work of clearing the site and re-erecting the wall. Mr. Penn is the undisputed owner of both of these firms. It was alleged by the Prosecution but denied by the Defence that Mr. Wheatley was a co-owner. Mr. Wheatley did admit to the police however that he offers management services to both businesses.

[7] Two contracts were signed between the BVI Government and the firms in question for the necessary works. Mr. Wheatley executed both contracts on behalf of the Government. Mr. Penn signed on behalf of each of the firms. Mr. Wheatley, along with other members of his staff, also signed the requisite purchase orders and payments vouchers to give effect to the carrying out and completion of the contracts.

[8] The new wall was duly constructed. But the Government thought that something was awry with these contracts. A criminal investigation was carried out, resulting ultimately in the bringing of the charges. In simple terms, the Prosecution's case was that Wheatley and Penn were really business partners; that Wheatley, a public officer, had dishonestly engaged in wholly inappropriate conduct by, among other things, being on both sides of the same contracts; and that Penn had aided and abetted him in doing these things.

[9] In the course of the trial the Prosecution tendered in evidence an affidavit of a bank official, Mr. Jorge L Miro Santa. The Crown relied upon the provisions of the Banker's Books (Evidence) Act to have this affidavit form part of their case. The affidavit had attached to it some 52 exhibits of banking documents. The Defence objected strenuously to the production of this evidence but the objections were overruled by the learned Magistrate. At the hearing of the appeal, Counsel for the accused men renewed their attack on the admissibility of Mr. Santa's affidavit and the attached exhibits. I think a convenient point to start in determining this appeal is to address this ground of appeal.

The Banker's Books (Evidence) Act

[10] The issue unfolded in the following manner. In the course of the trial, Counsel for the Prosecution indicated to the court that he wished to have Mr. Santa's evidence submitted in affidavit form. No previous application or court order had been made pursuant to the Banker's Books (Evidence) Act. Prosecuting Counsel seemed to have taken the view that once the affidavit was in conformity with the requirements prescribed by sections 3–6 of that Act, he was entitled to have the evidence adduced in affidavit form and that all that was then required was for the Magistrate "to give …leave to refer to the affidavit".

[11] I don't believe that was a proper way to go about adducing the evidence. Sections 3–6 of the Banker's Books (Evidence) Act were intended to protect bankers by eliminating the inconvenience of having personally to appear in court and produce original records. Section 7 relates to parties in litigation. See: *Pollock v. Garle* [1]. It seems to me that what section 7 intends is that before a party in litigation can produce "entries in a banker's books", that party must first obtain an order permitting the party to inspect and take copies of the relevant documents. The party who desires to have bank officials take advantage of the provisions of section 3–6 must invoke section 7 and apply to the court. The application for such an order may be made with or without notice to the bank or any other party. Unless the court otherwise directs, the order must be served on the bank three clear days before it is to be obeyed. These provisions of the Act ensure that the court retains control over the circumstances surrounding access, by or at the instance of a litigant, to the personal, ordinarily confidential information of customers of the bank. Thus, an application may be refused by the court if the application is couched in terms that are too wide[2]; or if the targeted account is not in form or in substance the account of one of the parties in litigation[3]; or if the application seeks to have the bank produce material that cannot conceivably fall

[1] *(1898) 1 Ch. 1*
[2] *See: R v. Dadson (1983) 77 CAR 91*
[3] *See: Pollock v. Garle, op. cit.*

under the statutory definition of banker's books[4]. While the application can be made during a trial, it is a proceeding that is distinct from the trial itself. Evidence must be adduced in support of the application. A party affected by the order, a bank perhaps, may appeal the making of the order[5].

[12] The procedure adopted here was that, without any prior court order, copies of various banking documents were made and presented to the court as evidence in the form of an affidavit with exhibits. In my view the evidence thereby adduced was not properly obtained. The documents were irregularly tendered in evidence and that irregularity could not be cured by the order of the Magistrate overruling an objection to the very irregularity.

[13] The question now is what consequence should this have on the trial and on the appeal. Counsel for the accused have asked us to dismiss all the charges because Mr. Santa's evidence was so central to and inextricably bound up with the entire case against the accused men that no case can be made out without that evidence. I bear in mind that this was not a jury trial. Moreover, a wide variety of facts and circumstances was presented by the Crown in support of their case. I don't agree with counsel. I believe it is possible to disregard the impugned evidence and such other evidence as was dependent upon the same and then to consider, in relation to the charges in issue, whether there was still sufficient evidence to make one feel sure of the guilt of the accused. That is the course I propose to adopt.

The charges contrary to section 82 – Conflict of interest

[14] This was the first time that anyone had ever been prosecuted for an offence contrary to section 82 of the Criminal Code, 1997. The section states:

> Any person who, being in the public service, and being charged by virtue of his employment with any judicial or administrative duties respecting property of a special character, or respecting the carrying on of any manufacture, trade or business of a special character, and having

[4] *See: Williams v. Williams (1988) 1 QB 161*
[5] *See: Williams v. Williams, op. cit.*

> acquired or holding, directly or indirectly, a private interest in such property, manufacture, trade or business, discharges any such duties with respect to the property, manufacture, trade or business in which he has such an interest or with respect to the conduct of any person in relation thereto, commits an offence and is liable on conviction to imprisonment for a term not exceeding one year.

[15] The accused were charged with four offences contrary to that section. The four charges were similarly styled. The men were charged with "exercising power in respect of a matter in which you have a personal interest contrary to section 82 of the Criminal Code of the Laws of the Virgin Islands". The charges were grounded on various documents that were signed by Wheatley in connection with the contracts to clear the site and build the wall. Penn was charged with aiding and abetting the commission, by Wheatley, of the offences. The differences in the four charges related to the nature of the document signed by Wheatley.

[16] Full particulars were given to the accused of each of these four charges. Typically these particulars read:

> Wheatley, on the 10th day of January, 2002, being a person employed in the public service of the Government of the British Virgin Islands, namely Financial Secretary, and charged by virtue thereof with administrative duties regarding property of a special character namely public funds for public infrastructure and/or business of a special character, namely public infrastructure construction, to wit: contract number 44 of 2001 between the Ministry of Finance and P&W Heavy Equipment, for heavy equipment and trucking pertaining to the construction of a retaining wall at Long Look, Tortola, and holding a direct or indirect private interest in the said property or business by way of your interest in P&W Heavy Equipment, discharged your public duties with respect to the said property or business or with respect to the conduct of a person in relation thereto in that you signed a payment approval form and voucher authorizing payment in the sum of $7,123.72 to P&W Heavy Equipment under the said contract…..

[17] Counsel for the accused submitted that the charges laid were uncertain and duplicitous. It was argued that, by reason of the repeated use of the word "*or*" in section 82, that section created several different offences and that the actual charge laid created uncertainty, embarrassment and prejudice. Counsel launched a vigorous onslaught on the concept that a charge could validly contain the words "and/or". It was also submitted that the concept of exercising power was different to the performance of duty. Before the learned Magistrate, counsel cited numerous

authorities, including *R v. Thompson*[6], *R v. Molly*[7], *R v. Surrey Justices*[8], *R v. Disney*[9] and *R v. Wilmot*[10].

[18] The learned Magistrate's assessment was that

> "…Section 82 clearly targets acting in conflict of interest. The section says that if you have a certain status in the public service, i.e. you have administrative or judicial duties with respect to a matter and you have a private interest in that matter and you act regarding that matter, whether [by] yourself or by directing someone to act, you commit an offence…….
>
> …the section creates a status, collides it with a private interest and says if you act or cause someone to act in that state of affairs, you commit an offence. The fact that the private interest can take a number of forms, and that these various forms are set out, whether conjunctively or disjunctively in the particulars of the offence does not make the offence duplicitous".

[19] The common law has gone beyond the upholding of strictly technical defects of form such as have been raised here by Counsel for the Defence. And statute law has in many instances given the court generous powers to amend and severely curtailed one's ability successfully to raise such points, particularly on appeal[11]. Not surprisingly, Counsel for the Defence quoted no modern authority in support of his submission. In determining whether a charge is duplicitous, courts now take the sensible approach of "applying common sense and … deciding what is fair in the circumstances"[12]. Whether one, or more than one, offence is disclosed is really a question of fact and degree[13] and the learned Magistrate, in my judgment, rightly rejected Counsel's submissions.

[20] The Defence here had been supplied with draft complaints before the trial. They were also given defence witness statements and exhibits. In my view the accused

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[6] *(1913) 9 CAR @ 252-261*
[7] *(1921) 15 CAR @ 170-171*
[8] *(1932) 1 K.B. @ 450-453*
[9] *(1934) 24 CAR @ 49-51*
[10] *(1934) 24 CAR @ 63-69*
[11] *See Magistrate's Code of Procedure Act Cap 44 sections 175, 176, 217, 218, 219 & 221*
[12] *See: DPP v. Merriman (1972) 56 CAR 766 @ 775 per Lord Morris of Borth-Y-Gest*
[13] *See: R v.Wilson (1979) 69 CAR 83*

could not have been misled, deceived or prejudiced. The Magistrate was entitled and right to find, as she did, that the statement of the offence was not the only part of the charge; that the particulars given conformed with the charge and that any question that could have been raised with regards the validity of the charges was adequately answered by various sections of the Magistrates Code of Procedure.

[21] Regarding the evidence led by the Prosecution to support the conflict of interest charges, even without the impugned affidavit evidence of the banker and any other testimony that relied for its force on that evidence, it is apparent that the Crown had assembled a very strong case against the accused.

[22] After evaluating the evidence led, the Magistrate assessed that the witnesses who testified, both for the Crown and the Defence, were all witnesses of truth. It was not disputed that Mr. Wheatley was employed in the public service as Financial Secretary of the BVI. He was the accounting officer in the office of the Chief Minister. He had clear administrative duties regarding property. Contracts were entered into by him on behalf of the Government with P&W and Accurate. He discharged his public duties by signing the requisite purchase orders, payment approval forms and vouchers.

[23] The real issue for determination was whether Wheatley had a prohibited interest in Accurate and P&W. If that were proved then the offences under section 82 would be established in relation to him. In that event, Mr. Penn would be liable if it could be said that Mr. Penn aided and abetted Mr. Wheatley.

[24] The law on the meaning of private interest was discussed in *England v. Inglis*[14] and *Rands v. Oldroyd*[15]. In the former case it was held that the object of sections akin to section 82 was to prevent the conflict between interest and duty that might otherwise inevitably arise. The interest of the public officer must be a pecuniary or

[14] *(1920) 2 KB 636*
[15] *(1959) 1 QB 204*

at least a material interest but it need not be a pecuniary advantage. In *Rands* the point was restated that the mischief these offences intended to prevent is that public officers should not be exposed even to a semblance of temptation. For the commission of the offence it is unnecessary for the public officer to be motivated by a dishonest or oblique purpose. In this sense, I agree with Counsel for the Crown that the section creates an offence of strict liability. The case of *Rands* illustrates the point. The court found there that the defendant had acted throughout in an open and honourable manner and had made efforts to avoid the conflict of interest. It was still found nonetheless that he was in breach of the statute.

[25] The Crown here produced a staggering amount of evidence to prove the prohibited interest of Mr. Wheatley in both Accurate and P&W. I shall look at some of this evidence later. Suffice it to say at this point that the learned Magistrate, with clinical and admirable precision, went through all the evidence and she was entitled and right to find that Mr. Wheatley had a prohibited interest both in Accurate and in P&W. I also agree with the Magistrate that the fact that Wheatley's admission that he was a management consultant for the companies was sufficient to bring him within the range of section 82.

[26] As for Penn, he was knowingly contracting with a person who held a prohibited interest. Penn knew Wheatley's true status and role in these two firms. He also knew that Wheatley had to sign off on the contracts so that he Penn could be paid. Penn was thus aiding and abetting Wheatley to do that which it was illegal for Wheatley to do. In my judgment the Magistrate was right to find both accused Guilty of the offences laid under section 82.

The Theft charges

[27] As stated earlier, the arrangement to replace the old wall was embodied in two contracts numbered respectively 43 and 44. One contract was purportedly for demolishing the old wall and clearing the site. The contract sum for this was $14,247.44. The other contract was for the actual construction of the new wall.

The consideration for that latter contract was $58,073.12. Payment on each contract was made in two equal instalments. The accused were charged with four counts of theft. The theft counts related to each of the four instalments.

[28] Counsel for the Crown opened the case to the Magistrate with the startling submission that no wall was built for the monies paid out to Accurate and P&W on the contracts. The Prosecution opened their case in this way on the basis of the detailed information that had previously been provided by Mr. Penn himself to the chief investigating officer, Inspector Alwyn James. Inspector James questioned Penn about contracts 43 and 44. Penn gave the police to believe that these contracts were in respect of the construction of two walls neither of which was the Alice Thomas wall in question. Penn told the police that contract No. 43 was in respect of a wall in Nottingham Estate and that contract No. 44 was in respect of a wall "at Shady's property in Long Look". This interview was reduced into writing. Penn re-read the questions and answers, made several corrections and signed it as true and correct. Penn also accompanied the police and showed them actual walls that, he said, represented *the walls* mentioned by him in the interview in respect of contracts 43 and 44. Shortly after this, Wheatley, when charged by the police, told Inspector James, "You think I would sign a contract for a wall that did not exist. Did you ask the girls in Finance where *the walls* are? The contractor has shown you *the walls*." (my emphasis). The significance of underscoring the inaccurate reference to "*the walls"* is obvious. Contracts 43 and 44 never were intended to build more than one wall.

[29] Inspector James, in his investigations, discovered that the walls shown to him by Penn could not in fact have been in respect of contracts 43 and 44. The Inspector had ascertained that those walls were actually in respect of contracts numbered respectively 8 and 9. The Crown therefore, up to the time of the opening address, assumed that no wall was in fact built in respect of contracts 43 and 44.

[30] After the Crown opened the case, the matter was adjourned for several days. Some time during this adjournment, Mr. Penn called Inspector James and changed his story. Penn now indicated, truthfully, that a single wall was in issue. He also gave the Inspector correct information as to the location of that wall. He told Inspector James that contracts 43 and 44 built the Alice Thomas wall and that he was being prosecuted for a wall that was built.

[31] This disclosure meant that the Prosecution were compelled either to abandon the theft charges or to place them on a different footing. They opted for the latter. The Defence naturally made much of this circumstance. It was submitted to the court below that the Prosecution should have been bound by their opening. In my view, the Magistrate rightly rejected this submission. Prosecuting counsel's misleading statements in the opening were a direct consequence of the mis-statements made to the police by the accused themselves. As the case unraveled it was made clear that the Prosecution was no longer suggesting that no wall was built. Moreover, it must at all times be borne in mind that this case was tried before a single Magistrate and, adopting the words of Lord Chief Justice Hewart in *Driscoll*[16], "it is idle to suggest that after a [seven month] trial the expressions complained of [during Opening by the Prosecution] could have dominated the opinion of [an experienced judicial officer]".

[32] In determining whether or not theft was made out, the learned Magistrate properly focused on whether the Crown had made out a case of dishonest appropriation. Her Worship meticulously reviewed the authorities cited to her and concluded that, as a matter of law, for a count of theft to be maintained, the dishonesty of the accused must directly lead to some quantifiable loss on the part of the alleged victim; that for theft to be found, the victim's interest must in every case be adversely affected by the dishonesty of the thief. The Magistrate then found as a fact that in this case the contracts were not overpriced and that the Government

[16] *(1928) 20 CAR 161*

got value for the monies disbursed. In these circumstances she acquitted the defendants of theft. The Prosecution have appealed those dismissals.

[33] Before proceeding further it is only right that I should refer to section 166 of the Magistrate's Code of Procedure, Chapter 44 of the Laws of the BVI. That section specifically entitles this court, on an appeal from the Magistrates' court, to draw inferences from the evidence given and to decide the appeal with reference both to matters of fact and to matters of law. That section must be seen against the background of the Magistrate's decision to accept as truthful the testimony of all the witnesses who gave evidence. The significance of all this is that, if after reviewing the evidence, the Magistrate found no dishonest appropriation, this court is not bound by that finding of fact. We are in as good a position to assess the evidence as the learned Magistrate was. It is quite open to us to reverse the Magistrate's fact finding if we consider that the evidence, and the reasonable inferences to be drawn from the evidence, so warrant.

[34] But let us start with the law. What is the law on theft? We need first to examine the statute that defines theft. Section 203 of the Criminal Code defines theft as follows:

> (1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it, and "thief" and "steal" shall be construed accordingly.
> (2) It is immaterial whether or not the appropriation is made with a view to gain, or is made for the thief's own benefit.

Central therefore to the statutory definition of theft are four important concepts, namely: i) there must be dishonesty on the part of the accused; ii) there must be an appropriation by the accused; iii) the property in question must belong to someone other than the accused; and iv) the accused must intend permanently to deprive the owner of the property in question. As indicated earlier, the learned Magistrate zeroed in on the concept of dishonest appropriation. A possible explanation, I believe, for the error she fell into, resulted from the fact that she opted to construe, as a composite phrase, the two words, "dishonestly appropriates". This approach was consistent with the position advanced by Lord

Hobhouse in the House of Lords case of *Hinks*[17]. The judgment of Lord Hobhouse however did not in that case find itself among the majority views expressed. The tenor of the majority judgment, which followed other House of Lords decisions[18], was to the effect that, in defining theft, and in determining whether or not a theft has taken place, it was better to regard "appropriation" as a separate element of the offence, distinct and apart from the element of dishonesty.

[35] The Criminal Code itself assists us with an understanding of what constitutes "appropriation". Section 205(1) states:

> Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by dealing with it as owner.

The cases of *Lawrence*[19], *Morris*[20], *Gomez*[21], and *Hinks*[22] in particular, all decisions of the House of Lords, have clarified the meaning of the term. In *Lawrence* it was decided that in a prosecution of theft it was unnecessary to prove that the taking or appropriation was without the owner's consent. In *Morris* a conviction on a count of theft was sustained where the owner had not yet lost anything, nor had the thief gained anything. In *Gomez* the House, by a majority, decided that a conviction of theft could be maintained where that which was alleged to be stolen passed to the defendant with the consent of the owner, albeit by a false representation. The House also held that such a passing of property need not necessarily involve an element of adverse interference with or usurpation of some right of the owner. In other words, an appropriation may occur where the entire proprietary interest passes. Any assumption by a person of the rights of an owner is sufficient to constitute an appropriation.

[36] These decisions of the House of Lords met with some measure of consternation on the part of some in the legal community. The civil and the criminal law have

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[17] *(2002) 2 CAR 1*
[18] *Lawrence (1972) AC 626; Gomez (1993) AC 442*
[19] *(1972) AC 626*
[20] *(1984) AC 320*
[21] *(1993) AC 442*
[22] *(1993) AC 442*

been placed on a collision course[23]. In *Hinks,* the House had an opportunity, soberly, to re-visit and re-consider the consequences of their previous judgments. The majority chose to stand firm and reiterate the House's holdings in *Lawrence* and *Gomez*. In *Hinks,* a lady was held rightly convicted of theft where she was able, by dishonest means, to persuade an older man of limited intelligence to bestow on her a gift of his life's savings of £60,000.00.

[37] Four important things regarding "appropriation" are to be gleaned from these authorities. Firstly, the present statutory definition of theft has done away with the old common law ingredient of asportation. Appropriation can no longer be equated with the taking and carrying away of property belonging to another. It is enough, for an appropriation to occur, if the accused merely assumes the rights of the owner. Secondly, an appropriation may occur even where the accused has not succeeded in effecting a deprivation of the owner of the owner's property, although of course a permanent deprivation *must* have been intended by the accused before theft can be found. Contrary to what was found by the learned Magistrate, it matters not whether there was or was not quantifiable loss on the part of the owner or whether there was gain to the thief. Thirdly, an appropriation occurs even where property passes to the accused with the consent of the owner. Even where the accused is a donee of a gift, the accused will still be considered as having appropriated the property. Fourthly, once an appropriation occurs, theft is committed if the accused was dishonest in going about the appropriation and intended permanently to deprive the owner of the thing in question.

[38] In determining whether or not a person is guilty of theft, one may wish first to ask whether there was an appropriation by the accused of someone else's property; whether there was an assumption of the rights of the owner. If there was not, then that is the end of the matter. If there was, then one must go on to determine whether that appropriation was done dishonestly with the intention of permanently depriving the owner of the property in question.

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[23] *See: Lord Steyn's judgment in Hinks for a discussion on this issue*

[39] To return to the factual situation here, as Financial Secretary, Mr. Wheatley was subject to the provisions of the Public Service Commission Regulations, General Orders, Public Service Code, Financial Regulations and such other regulations as the Government introduced for the conduct of officers and the dispatch of Government business. He was the accounting officer to the Chief Minister. He was an agent of the Government of the BVI entrusted with the property of the Government. As such he was almost always appropriating the property of the Government in one way or another. Notwithstanding the fact that they were rooted in contract, the disbursements to Accurate and to P&W constituted appropriations of Government's property. So long as Wheatley acted honestly and within the scope of his authority however, he could incur no liability of any kind.

[40] The issue is, so far as the counts of theft are concerned, whether those appropriations were made and received dishonestly. The test or definition of dishonesty was set out in *R v. Ghosh*[24]. Dishonesty describes the state of mind and not the conduct of the accused. The test is subjective but the standard of honesty to be applied is objective, the standard of reasonable and honest persons. One first applies the standard and then, having so done, one determines whether the accused must have realized that what was being done was, by those standards, dishonest. To this end if Wheatley, knowingly, acted outside the scope of his authority, then that might provide some evidence of dishonesty. If, further, he personally derived any benefit from these contracts, then a finding of dishonesty would be almost inescapable. See: *AG of Hong Kong v. Nai-Keung*[25].

[41] The Prosecution's evidence explored the full range of circumstances surrounding the contracts to build the wall, from the collapse of the old wall to the construction of and payment for the new one. A substantial body of evidence, both direct and circumstantial, was adduced to prove the dishonesty of the accused. It was

[24] *(1982) QB 1053*
[25] *(1988) CAR 174*

established for example that Mr. Penn had been involved in the construction of the initial wall that had collapsed during heavy rains and that was being replaced. That first wall collapsed within a year of being erected. It fell down "more or less in one piece". An experienced quantity surveyor testified that in his professional opinion, faulty construction might have led to the collapse of that original wall. The Director of Financial Management in the Ministry of Finance testified that in such circumstances it would have been unusual for the same contractor to be retained, as Penn was, to re-erect the wall without an investigation.

[42] The Bills of Quantities submitted in respect of contracts 43 and 44 were wholly inappropriate and grossly misleading. They appeared to suggest that some works other than what was actually contracted for were contemplated. The quantities in respect of both contracts, when juxtaposed to each other, do not give any realistic picture of what was to be built or what was actually built. Looking at them one gets the impression that two different walls were to be constructed. Moreover, and very curiously, those bills of quantities were identical to bills of quantities supplied by Penn to the Government on other projects.

[43] The Prosecution established that normally, the Public Works Department (PWD) takes care of Government's works programme. The PWD is usually involved, in a supervisory role, in the building by Government of retaining walls on private property. The very contracts in issue here, Nos. 43 and 44, contained a clause stating that the supervising officer was a Mr. William Archer, an officer in the PWD. In point of fact, neither Mr. Archer nor anyone else from the PWD was involved in supervising the performance of these contracts.

[44] The payment authorisations in respect of the contracts should properly have been signed by an experienced technical officer assigned to the construction section of the PWD. Such an official would have been in a position to evaluate the work done. That did not happen. The works were neither supervised nor examined. The

payment authorizations were signed by an officer in the Ministry of Finance, on Wheatley's instructions.

[45] As Financial Secretary, Wheatley was perfectly aware that, under the regulations that circumscribed his conduct, he was not entitled nor authorised to enter into contracts in which he had a private interest. Civil Service regulations required him to disclose fully to the Governor any private activity upon which he was engaged or in which he had a private pecuniary interest likely to result in a conflict of interest. Mr. Wheatley was also aware that special regulations applied to contracts where there was a consideration in excess of $60,000.00. For such contracts tenders should be invited. If the consideration was for a sum between $5,000.00 and $60,000.00, i.e. a "Petty Contract", the Accounting Officer should normally source at least two quotations from qualified suppliers.

[46] Contracts 43 and 44 flouted these requirements. The engagement of Penn to rebuild the collapsed wall was artificially split into two contracts to avoid the tender requirement and, in any event, no alternative quotes were obtained by Wheatley. What worsened these defaults is the fact that in March, 2000, Wheatley himself authored a Financial Circular to all Accounting Officers. In that circular, he instructed his subordinates, on the matter of Petty Contracts, "multiple estimates must be sought for all purchases albeit services or goods irrespective to quantum" and that "when it becomes necessary to issue a Petty Contract a short list of Contractors (minimum of three) will be required". Further, he advised, in the same circular that, "when it becomes necessary to split a major contract into multiple Petty Contracts, the Financial Secretary and *Executive Council's approval* must also be sought" (my emphasis). With respect to contracts 43 and 44, no executive council approval was sought. Mr. Wheatley evidently disregarded the lofty standards of prudence that he so scrupulously demanded of his subordinates.

[47] The evidence in this case also disclosed that in December, 2001, the very month the contracts were entered into, Mr. Wheatley wrote a stinging memo to the Chief

Auditor demanding "to know, what is the purpose of your continuous investigations into this Ministry?" He regarded the auditor's probes into his department as "harassment of one professional to the next". This memo drew a sharp response from the Deputy Governor who properly advised Wheatley that his office "should take the lead in setting the example of financial probity and cooperating in audit activity, whether internal or external audits…"

[48] In January, 2002, the Deputy Governor requested of Mr. Wheatley, in writing, "to disclose, any investment or acquisition of shares in any company carrying on business in the British Virgin Islands or any direct interest in any professional, commercial agricultural or industrial undertaking in the British Virgin Islands". The letter also informed Wheatley:

> "It would also assist in speeding up deliberation if you would state that in your opinion no activity in which you are engaged or in which you have a "private pecuniary interest" is likely to offend against the provisions of sub-paragraph (c) of General Order 3.6 of Paragraph 8 of the Public Service Code 1997."

Paragraph 8 of the Public Service Code 1997 states

> "Public officers should not misuse their official position or information acquired in the course of their official duties to further their private interests or those of others. They should not receive benefits of any kind from a third party which might reasonably be seen to compromise their personal judgment or integrity".

[49] Wheatley responded tersely. He listed, as companies in which he had "shares and/or an interest", eight businesses, including Wheatley Consulting and Wheatley Construction. He must have known then of his management consultancy with Accurate and P&W but his letter does not mention those companies. Nor did he respond in any other manner to the more fundamental inquiry of the Deputy Governor regarding conflict of interest. The learned Magistrate rightly found Wheatley's response to be short of constituting a full disclosure; that it was not the whole truth, particularly in light of his subsequent acknowledgment to the police that he acts as a management consultant to Accurate or P&W.

[50] Earlier in this judgment, I alluded to what I euphemistically referred to as Mr. Penn's mis-statements to the police about the location of the wall in respect of the two contracts. Wheatley gave his approbation to these mis-statements. Prosecuting counsel highlighted the unlikelihood that Penn would have failed to remember the wall in question given the length of the wall and the fact that he was asked about it less than a year after he had built it.

[51] The Prosecution put in evidence a mass of documents to establish the connection between Mr. Wheatley and the two companies. Leaving entirely aside the impugned affidavit evidence of Mr. Santa, other evidence supports the learned Magistrate's conclusion that Wheatley had a direct interest and played a prominent role in Accurate and P&W and that he and Penn were joint owners of these businesses. She took into account, among other matters, that Wheatley spent several hours each week at the offices of Accurate; that he had written to the telephone company and assumed the liability of the service required by Accurate Construction; that when Accurate required carpeting supplies, the bill was sent to Wheatley who purchased the material; that on one occasion Wheatley issued instructions regarding the disciplining of a staff member of Accurate; and that when the offices of Accurate were searched, cheques were recovered, bearing Wheatley's signature, drawn on the accounts of both Accurate and P&W.

[52] The evidence that Prosecuting Counsel referred to as "the smoking gun" in this case came as a consequence of the search made by Inspector James of the offices of Accurate. Among the documents unearthed was a list headed, "Alice Wall – Long Look Cheques Paid". Among the list of recipients of cheques paid, one finds an indication that two cheques were paid to Wheatley Consulting. One cheque is said to be numbered 1292 and dated 21st December, 2001 for $4,000.00. The other is said to be cheque number 1293, dated 21st December, 2001 for $5,400.00. Wheatley Consulting is a business wholly owned by Mr. Wheatley. Here then was evidence that Wheatley actually profited from the contracts.

[53] Taken singly and serially, some of these pieces of evidence might be explainable. Counsel for the Defence argued that the rebuilding of the collapsed wall was an emergency affecting "life and home". It is conceivable therefore that the Government was obliged to proceed with some haste. Taken singly, one might regard some of the evidence put forward as proof of sloppiness or ineptitude or coincidence or happenstance or forgetfulness or mere dereliction of duty. All the facts and circumstances proved however, layered one atop the other cannot be assessed singly. One has to take them all together and ask whether, looked at as a single package, they establish dishonesty on the part of the accused. When one asks that question I have to say that I am satisfied beyond reasonable doubt that they do. Counsel for the Defence submits that the Magistrate did not expressly find dishonesty. But that is true only because the Magistrate misled herself into taking the view that an explicit finding of dishonesty was irrelevant because the Government had suffered no quantifiable loss and therefore theft did not arise.

[54] In my judgment, the Magistrate was right to conclude that Wheatley and Penn were business partners. They both set out on a course of conduct to have Wheatley use his position as Financial Secretary dishonestly, in breach of the regulations that bound him, to appropriate and facilitate the appropriation of the monies of the Government of the British Virgin Islands. They intended permanently to deprive the Government of those funds. It matters not that in exchange Penn built a wall at Long Look with part or all of those funds. It is irrelevant whether, in the wall constructed, the Government got good value for money. Based on the definition of theft as prescribed by Parliament, the accused are both guilty of each of the four counts of theft charged. The appeal against the decision of the learned magistrate to acquit them of these charges is allowed.

Sentence

[55] It was submitted that the custodial sentences of 5 months and 3 months imposed respectively on Wheatley and Penn were unjustified in all the circumstances and particularly in light of the unblemished criminal record of the two accused and, with

respect to Wheatley, having regard to the evidence of the Acting Governor that Wheatley's gratuity in respect of his four year contract had been withheld pending the outcome of this trial. The sum withheld could be as much as $100,000.00. I see no reason why this court should take into account a matter which essentially is one of contract between Wheatley and the Government. If the Government wrongly withheld those funds then Mr. Wheatley has recourse in the civil law.

[56] The learned Magistrate took into account the previous good character of the accused along with all the mitigating factors so eloquently and ardently put forward by Mr. Archibald QC. She however properly regarded the conflict of interest charges as being "extremely serious". I can find no basis to interfere with the learned Magistrate's sentence. I do not consider it excessive or harsh in all the circumstances and accordingly, I would not interfere with the manner in which she chose to exercise her discretion. I would also dismiss that ground of appeal and affirm her convictions and sentences on the conflict of interest charges.

[57] This court has found each of the accused guilty of theft, an even more serious offence. Theft from the Government is as insidious as it is contemptible. Even taking into account the fact that a wall was built and that, in a sense, the convictions of theft may be regarded as technical, nonetheless, the level of dishonesty that was in evidence here merits a custodial sentence. That the accused have no prior record is of little avail. If Wheatley had had a record he may not have been placed in such a grave position of trust. In all the circumstances I believe a term of imprisonment of 6 months for each accused is deserved on each count. These sentences will run concurrently and also concurrent with the

sentences imposed by the learned Magistrate.

Adrian Saunders
Justice of Appeal

[58] Redhead, J.A. : I agree

Albert Redhead
Justice of Appeal

[59] Alleyne, J.A. : I agree

Brian Alleyne
Justice of Appeal