In The Supreme Court of Bermuda

CRIMINAL JURISDICTION
Case No. 25 of 2018

BETWEEN:

THE QUEEN

-and-

DIEDRE WOOLGAR

Before: **The Hon. Justice Juan P. Wolffe, Acting Puisne Judge**

Appearances: Ms. Nicole Smith for the Prosecution
Ms. Susan Mulligan for the Defendant

Dates of Hearing: 10th December 2019, 22nd July 2020, and 13th August 2020
Date of Sentence: 10th September 2020

SENTENCE

False Accounting – Theft of $110,759.93 by employee – Breach of Trust - Defendant has mental health challenges – Whether a suspended sentence is appropriate

WOLFFE, AJ.

1. On 19th June 2019 the Defendant pleaded guilty to (i) False Accounting, contrary to section 351(1) of the Criminal Code Act 1907 (the "Criminal Code")(Count 1); and (ii) Theft, contrary to section 337(1) of the Criminal Code (Count 2).

2. It should be pointed out that due to the delay in the receipt of psychological/psychiatric reports and a social inquiry report, the unavailability and eventual subpoenas of clinical psychiatrists to give evidence as to the mental state of the Defendant[1], requests for adjournments by Ms. Susan Mulligan (Defence Counsel)[2], and drastically reduced Supreme Court operations as a result of the COVID-19 pandemic[3], sentencing submissions of Prosecution and Defence Counsel had to be carried out in stages and could not be completed until 13th August 2020. The time which has elapsed from the date the Defendant first appeared in the Magistrates' Court on the 25th June 2018 to the date of her sentencing, a period of just over two (2) years, is a factor which will be taken into consideration in this sentence.

Summary of the Evidence

3. The Complainants in this matter are Duane Simons and Donald Madeiros (together referred to as "the Complainants") who are the co-owners of Circuit Supply Inc. ("CSI") and First Class Electrics Ltd. ("FCE"). CSI sells electrical materials to FCE, to contractors, and to members of the public for residential, commercial and service jobs. Some customers come

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1 During the sentencing hearing on 10th December 2019 Ms. Mulligan indicated to the Court that she intends to call a Dr. Chantell Simmons and a Dr. Cherita Rayner to give evidence as to the Defendant's mental state, and therefore an adjournment would be required so that they may attend Court. The matter was therefore adjourned to 3rd February 2020 which was when the doctors would be available.

2 The sentencing hearing was set to continue on 3rd February 2020 but Ms. Mulligan requested an adjournment due to her involvement in a Supreme Court trial (by way of a letter dated 30th January 2020).

3 The Bermuda Government enacted Emergency Powers Regulations (COVID-19 Shelter in Place) Regulations 2020 which effectively paused all Supreme Court operations from the end of March 2020 to the 2nd May 2020 when limited Court matters were being conducted remotely. It was not until the 1st June 2020 that the Supreme Court was able to schedule very limited non-contentious in-person Court appearances. To date, Supreme Court trials are not as yet being heard.

into the storefront to purchase materials via cash, cheque, or credit/debit card, and others have charge accounts from which a monthly statement is generated and they settle their accounts by cheque, cash, credit/debit card, or by online deposits.

4. The Defendant was employed with CSI for approximately eight (8) years as the Office Manager, and as a trusted employee she was responsible for the overall day-to-day operations of CSI and she worked without direct supervision. Her duties included the receipt of cash, reconciliation of financial transactions in the Quick Books Accounting System, and the depositing of cash and cheques into CSI's HSBC Bank account (the "Bank").

5. On or about 11th April 2018 Mr. Simons had a meeting with the Defendant to discuss concerns about the amount of cash and cheques that were in the Defendant's drawer and which had not been deposited into the Bank. The Defendant assured Mr. Simons that she would deposit the cash and cheques later that day as she was travelling overseas the next day. However, when Mr. Simons checked CSI's bank account on or about 7th May 2018 he discovered that the Defendant had made two (2) deposits on the 13th April 2018 but he could not determine what portion of the deposits represented cash and what portion represented cheques. Checking with a banking representative he was informed that both of the deposits were in the form of cheques. This concerned Mr. Simons as he knew that there should have been cash deposits as well.

6. On or about 10th May 2018 Mr. Simons spoke to Mr. Madeiros about his conversation with the banking representative and soon thereafter they commenced an internal investigation as they believed that the Defendant was stealing cash from CSI. On 11th May 2018 Mr. Simons had a meeting with the Defendant, and giving her the benefit of the doubt, he asked her to explain to him her reconciliation procedure, what was happening with the cash, and also discrepancies as why the bank account did not balance.

7. On or about the 12th May 2018 Mr. Madeiros opened the CSI office and therein he found a plastic bag on top of the cash till with a note stating "For drop off". Inside the plastic bag

were six (6) sealed quick deposit envelopes which contained cash deposits in three (3) of them and cheque deposits in the other three (3). He took the envelopes and placed them in the Bank's overnight deposit slot but it was at this point that he and Mr. Simons became more suspicious of the Defendant's behavior.

8. On or about the 17th May 2018 the Complainants asked a Consultant Accountant to assist them in determining how much cash had been received by CSI since 2017. The inquiries revealed that between 8th March 2017 and 13th April 2018 that $108,085.10 in point of sales cash had been received by CSI. The Consultant Accountant's checks of the Quick Books Accounting System also revealed that the Defendant made entries in the Quick Books "Undeposited Funds Account" ("Quick Books") on varying dates to reflect that the cash, broken down into five (5) time frames and accounts, had been deposited into CSI's bank account. However, a further check of CSI's bank account for the period March 2017 through to May 2018 confirmed that the said $108,085.10 in cash had not been deposited into the Bank. It was therefore concluded that the cash was stolen by the Defendant as she was the person solely responsible for handling and reconciling cash receipts, making postings in Quick Books, and depositing the cash into CSI's bank account. In essence, between 8th March 2017 and 10th May 2018 the Defendant knowingly entered into Quick Books that funds had been deposited into the Bank when they actually had not been.

9. A check of FCE's HSBC bank account revealed that on 11th May 2018 an intercompany transfer of $108,085.10, had been transferred from FCE's bank account to CSI's bank account. This amount was the exact same amount of cash that CSI received at the point of sale between 8th March 2017 and 13th April 2018 but which had not been deposited into CSI's bank account by the Defendant. In reviewing CSI's bank account it was noted that the said amount had been accounted for in five (5) individual amounts that were representative of the cash amounts that had been previously recorded as having been received by CSI in cash during the stated period. The transaction between FCE and CSI was unknown to the Complainants and it revealed to them that the Defendant was trying to conceal the fact that she had previously stolen the $108,085.10 in cash. As a result, on 18th May 2018 the Complainants made a formal complaint to the Bermuda Police Service.

10. Further inquiries revealed that there were several discrepancies between the recorded cash sales and transactions made on customer accounts during the period in question. As a result, adjustments were made to reconcile accounts and it was discovered that a further $2,674.83 in cash sales had not been deposited into CSI's bank account and that the cash was not recorded by the Defendant in any other of CSI's business affairs. This amount was therefore also stolen by the Defendant.

11. The Defendant was informed about the matter and arrangements were made for her to be spoken to by police on the 22nd May 2018. However, on the 21st May 2018 police were notified that the Defendant attempted to commit suicide and was undergoing medical attention. Apparently, the Defendant ingested a cocktail of prescription pills (such as diazepam, Requip, Iamotrigine, and Wellbutin). On 21st June 2018 the Defendant attended the Hamilton Police Station and on 23rd June 2018 she was formally arrested for the offences charged.

12. In all, between 8th March 2017 and 13th April 2018 the Defendant stole money to the total value of $110,759.93 from CSI.

Sentencing Guidelines

13. Ms. Nicole Smith for the Prosecution asserts by way of oral and written submissions that the appropriate sentence is a term of imprisonment for twelve (12) months on each count on the Indictment to run concurrently, and, that such imprisonment should be followed by probation for three (3) years. Ms. Susan Mulligan is in agreement with the Prosecution's submissions as to the twelve (12) month term of imprisonment but she argues that there is justification for it to be suspended for a period of two (2) years.[4]

14. In respect of the False Accounting offence (Count 1), section 351(1) of the Criminal Code stipulates:

[4] See page 4 of the Prosecution's written submissions and page 9 of the Defendant's written submissions.

"False accounting
351 (1) Where a person dishonestly, with a view to gain for himself or another or with intent to cause loss to another—

(a) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose; or

(b) in furnishing information for any purpose produces or makes use of any account, or any such record or document as aforesaid which to his knowledge is or may be misleading, false or deceptive in a material particular;

he shall be guilty of an offence and liable on summary conviction to a fine of $10,000 or imprisonment for five years, or both and on conviction on indictment to a fine of $100,000 or imprisonment for ten years or both."

15. In relation to the Theft offence (Count 2), section 337(1) of the Criminal Code provides:

"Theft
337 (1) A person guilty of theft shall be liable on summary conviction to a fine of $10,000 or to imprisonment for five years, or both; and on conviction on indictment to a fine of $100,000 or to imprisonment for ten years, or both."

16. Clearly, the false accounting offence and the theft offence carry hefty maximum sentencing tariffs thereby registering the Legislature's unequivocal position that such offences should be treated with a considerable degree of harshness. But of course, exactly what sentence should ultimately be imposed on the Defendant should be determined by the purpose and principle of sentencing expressly stipulated in sections 53 to 55 of the Criminal Code ("Sections 53 to 55"), guideline cases, and of course, the circumstances of this case.

17. Sections 53 to 55 are well-rehearsed in the Courts and in most instances they do not require a verbatim citation. However, given the circumstances of this case, and the issues which have surfaced, it would be instructive to refer to sections 53 to 55 in their original statutory form. Which is:

"Purpose

53 The fundamental purpose of sentencing is to promote respect for the law and to maintain a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives—

(a) to protect the community;

(b) to reinforce community-held values by denouncing unlawful conduct;

(c) to deter the offender and other persons from committing offences;

(d) to separate offenders from society, where necessary; to assist in rehabilitating offenders;

(e) to provide reparation for harm done to victims;

(f) to promote a sense of responsibility in offenders by acknowledgement of the harm done to victims and to the community.

Fundamental principle

54 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Imprisonment to be imposed only after consideration of alternatives

55 (1) A court shall apply the principle that a sentence of imprisonment should only be imposed after consideration of all sanctions other than imprisonment that are authorized by law.

(2) In sentencing an offender the court shall have regard to—

(a) the nature and seriousness of the offence, including any physical or emotional harm done to a victim;

(b) the extent to which the offender is to blame for the offence;

(c) any damage, injury or loss caused by the offender;

(d) the need for the community to be protected from the offender;

(e) the prevalence of the offence and the importance of imposing a sentence that will deter others from committing the same or a similar offence;

(f) the presence of any aggravating circumstances relating to the offence or the offender, including—

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factors;

(ii) evidence that the offender, in committing an offence, abused a position of trust or authority in relation to the victim;

(fa) ……[5]

(g) the presence of any mitigating circumstances relating to the offence or the offender including—

(i) an offender's good character, including the absence of a criminal record;

(ii) the youth of the offender;

(iii) a diminished responsibility of the offender that may be associated with age or mental or intellectual capacity;

(iv) a plea of guilty and, in particular, the time at which the offender pleaded guilty or informed the police, the prosecutor or the court of his intention so to plead;

(v) any assistance the offender gave to the police in the investigation of the offence or other offences;

(vi) an undertaking given by the offender to co-operate with any public authority in a proceeding about an offence, including a confiscation proceeding;

(vii) a voluntary apology or reparation provided to a victim by the offender."

18. The fundamental purpose and principle of sentencing set out in sections 53 to 55 are, in large part, consistent with the spirit and the intent of legal principles enunciated in actual case law in Bermuda and in the United Kingdom (which predate and postdate the 2001 enactment of sections 53 to 55).[6] In this regard, and with particular reference to offences and circumstances similar to the case at bar, no case provides more helpful guidance than the UK authority of ***R v. Barrick (1985) 7 Cr.App.R.(S) 142***. It is no wonder that both Prosecution and Defence Counsel referred to ***Barrick*** as it is widely accepted as the seminal case in relation to the approach to take when sentencing for theft and fraud offences. I will therefore cover ***Barrick*** in some detail.

[5] This sub-subsection of section 55 was omitted as it is inapplicable to the facts of the case at bar.

[6] Sections 53 to 55 were integral to the Bermuda Government's "Alternative to Incarceration" regime which compelled the Courts to first consider all other sanctions before arriving at the imposition of a term of imprisonment.

19. The fourty-one (41) year old appellant in ***Barrick*** was employed to manage a finance company so that the owner could concentrate his attention on other business ventures. The attractive credentials of the appellant was that he was a former police officer and a security guard employed by a Government Department. Once employed the appellant had a clear run of the company as to how the finance company should be managed, and, the owner allowed the appellant to have money as the appellant so required. The owners implicitly trusted the appellant. However, after some time it became clear that the appellant was misappropriating funds from the company's accounts, and, upon closer scrutiny it was revealed that a great number of the accounts were bogus. An accountant examined the books and discovered that the company lost about £9,000 (and possibly more). The money was stolen from private individuals who could not afford to take the loss. Describing the nature of the offences committed by the appellant in his decision in ***Barrick*** Lord Lane CJ said that *"They were, in short, mean offences."*

20. The appellant was charged with false accounting, theft, and obtaining property by deception offences and after a trial before a jury he was convicted of the offences. At his sentencing hearing his lawyer, in mitigation, pointed to: his good character; his age at the time of the offence; no previous convictions; and, that he served as a police officer and that any term of imprisonment would be extremely deleterious and unpleasant for him. The appellant was sentenced to two (2) years' imprisonment on each count to run concurrently and he subsequently appealed this sentence to the Court of Appeal. In dismissing the appellant's appeal Lord Lane CJ commented:

> *"The type of case with which we are concerned is where a person in a position of trust, for example, an accountant, solicitor, bank employee or postman has used that privileged and trusted position to defraud his partners or clients or employers or the general public of sizeable sums of money. He will usually, as is in this case, be a person of hitherto impeccable character. It is practically certain, again in this case, that he will never offend again and, in the nature of things, he will never in his life be able to secure employment with all that that means in the shape of disgrace for himself and hardship for himself and also his family."*

and,

"In general a term of immediate imprisonment is inevitable, save in very exceptional circumstances or where the amount of money obtained is small. Despite the great punishment that offenders of this sort bring upon themselves, the court should nevertheless pass a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence. The sum involved is obviously not the only factor to be considered, but it may in many cases provide a useful guide. Where the amounts involved cannot be described as small but are less than £10,000 or thereabouts, terms of imprisonment ranging from very short up to about 18 months are appropriate……Cases involving sums of between £10,000 and £50,000 will merit a term of about two to three years' imprisonment. Where greater sums are involved, for example those over £100,000, then a term of three and a half years to four and a half years would be justified."

21. The above terms of imprisonment suggested in ***Barrick*** are in instances where the cases are contested. In relation to guilty pleas Lord Lane CJ noted that the Court should give the appropriate discount but that *"it will not usually be appropriate in cases of serious breach of trust to suspend any part of the sentence"*. Lord Lane CJ did however qualify this comment by stating, as he did throughout the authority, that *"the circumstances of cases will vary almost infinitely"*.

22. In respect of what factors the Court should focus on when assessing the appropriate sentence Lord Lane CJ went on to instruct this:

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

23. Lord Lane CJ highlighted that the appellant did not give any assistance to the police, that he proceeded to trial, that the fraud took place over a year and a half, and that the only mitigating feature was that the during the trial the appellant made some admissions to

certain activities of fraud. Moreover, Lord Lane CJ concluded that it was a case whereby no suspension of the sentence was merited. The appellant's sentence of two (2) years' imprisonment therefore remained undisturbed.

24. The suggested sentencing parameters of ***Barrick*** were inflation adjusted by the later UK authority of ***R v. Clark [1998] 2 Cr. App. R. (S.) 95*** which took into consideration *"present day equivalents of respectively £10,000, £50,000, and £100,000, the figures in Barrick"*, as well as the increased scale and complexity of white-collar theft and fraud. In this regard, Rose LJ in ***Clark*** expressed that:

> *"In light of all these circumstances, we make the following suggestions. We stress that they are by way of guidelines only and that many factors other than the amount involved may affect sentence. Where the amount is not small, but is less than £17,500, terms of imprisonment from the very short up to a 21 months will be appropriate; cases involving sums between £17,500 and £100,000 will merit two to three years; cases involving sums between £100,000 and £250,000, will merit three to four years; cases involving between £250,000 and £1 million or more will merit between five and nine years; cases involving £1 million or more, will merit 10 years or more. These terms are appropriate for contested cases. Pleas of guilt will attract an appropriate discount. Where the sums are exceptionally large, and not stolen on a single occasion, or the dishonesty is directed at more than one victim or group of victims, consecutive sentences may be called for."*

25. The appellant in ***Clarke*** was employed as a bursar of a charitable body and acted as a treasurer of a local church. He pleaded guilty to stealing £400,000 from his employer and £29,000 from the church over a period of four (4) years. His sentence of five (5) years' imprisonment was appealed and in reducing the sentence to one of four (4) years imprisonment (three (3) years for one count and one (1) year for another, both to run consecutively) Rose LJ conveyed the following:

> *"The offences were aggravated by the degree of trust reposed in the appellant, by both his employers and the church, by the period of four years over which the offense were committed, and by the fact that the proceeds were spent on personal expenditure, partly of an extravagant kind. The appellant's good character, to which three written references before the Court speak, and his frankness, co-operation and pleas of guilty at the first available opportunity, all mitigate sentence in this case. It is also significant that he has repaid some £120,000 to those who*

have suffered from his depredations. We bear in mind that the appellant's family are now living in much reduced circumstances, and that there have been other reasons for distress in the family."

26. Following *Barrick*, instruction can also be taken from the Bermuda Court of Appeal authority of *R v. Clayton Albert Busby [2004] Bda L.R. 29*. The appellant in *Busby* pleaded guilty to ten (10) counts of theft totaling $159,493.37 from the Bermuda Government when he was employed as a Medical Claims Assessor in Accountant General's Department, plus forgery and making documents without authority with intent to defraud offences. After inquiries it was discovered that the appellant processed a number of self-funded claims without providing the necessary documentation to support the claims, and in doing so he also used names of individuals known to him, but without their knowledge, to facilitate payment of the fraudulent claims. The appellant carried out this criminal conduct over a period of fifteen (15) months and he was sentenced to a term of imprisonment of two (2) years, three months of which to be served immediately and the balance of twenty-one (21) months to be suspended for three (3) years. The Crown appealed this sentence.

27. In upholding the Crown's appeal and substituting the appellant's sentence to one of twelve (12) months imprisonment Ward JA referred to several guideline cases which were decided in this jurisdiction. In particular, Ward JA illuminated the following:

"Dengler v R Criminal Appeal No. 11 of 2001 a sentence of imprisonment for 12 months was regarded by this Court as lenient for the theft of $91,223.90 and the attempt theft of $97,741.59. There was no appeal against a similar sentence in R v Duclos Criminal Jurisdiction 2002 Nos. 20 & 48 for the theft of $57,403.05 and $56,824.56 – a total of $114,227.61. We have also had the opportunity of reviewing the case of R v Martin Criminal Appeal 2003 : 18 which decided in the March 2004 Session of the Court and find that the sentence imposed of imprisonment for 9 months was on the low side. The guidelines suggested in R v Barrick (1985) 7 Cr.App.R.(S.) 142 still carry much weight and substantial terms of imprisonment are still required to mark publicly the gravity of certain offences.

We have therefore concluded that the sentence cannot be allowed to stand. It was unduly lenient to the respondent. It did not take into account sufficiently the needs of society."

28. What the authorities of ***Barrick***, ***Clarke***, and ***Busby*** (including the cases cited by Ward JA) have shown is that cases of theft and fraud committed by persons in a position of trust and authority have been on an evolutionary path towards harsher sentences. We are currently thirty-five (35) years on from ***Barrick***, twenty-two (22) years on from ***Clark***, and sixteen (16) years on from ***Busby***. One may therefore persuasively argue that in consideration of the prevalence of offences of this type, increased intolerance for white-collar crime, and inflation, that the sentencing guidelines in the cited authorities (not the legal principles which underpin them) should be lengthened to longer sentences. A more modernized approach to sentencing offences of this nature should probably be in the making. Accepting that a term of imprisonment is inevitable in these types of cases, and in consideration of the upward trajectory of sentences imposed over the years, it is suggested that the appropriate sentencing starting points and/or bands for theft and fraud offences, on a guilty plea and after a contested trial, should be increased. This is a sentiment which it appears Ward JA was expressing in ***Busby*** when he emphasized that the sentences imposed in certain cases were *"lenient"* or *"on the low side"*.

29. This leads me to whether or not there is scope, with these types of theft and fraud offences, for any term of imprisonment to be suspended. Ms. Mulligan for the Defendant advocates that there is such a scope.

30. In respect of suspended sentences section 70K of the Criminal Code provides that:

> *"Suspended sentence of imprisonment*
>
> *70K (1) If a court sentences an offender to imprisonment for 5 years or less it may order that the term of imprisonment be suspended in whole or in part during the period specified in the order ("the operational period"), which period shall not exceed 5 years, if the court is satisfied that it is appropriate to do so in the circumstances."*

31. The words "*if the court is satisfied that it is appropriate to do so in the circumstances"* connote that (i) there is scope for a suspended sentence to be imposed in any case where an offender has been sentenced to imprisonment for five (5) years or less, no matter the

severity of the offence; and that (ii) the Court should consider all the circumstances of the case when deciding whether to impose a suspended sentence. Factored into the circumstances of the case would of course include the objectives of sentencing set out in section 53 of the Criminal Code and the presence of any mitigating and aggravating features as highlighted in section 55 of the Criminal Code.

32. Now Lord Lane CJ in ***Barrick*** did comment that it is not usual in cases of serious breach of trust, such as in the case at bar, for a sentence to be suspended. However, this should not be taken to mean that under absolutely no circumstances should a suspended sentence be imposed. There is, depending on the circumstances of the case, still open to the sentencer to impose a suspended sentence. It's just that Lord Lane CJ felt that no such circumstances in ***Barrick*** merited a suspended sentence.

33. The same can be said of Ward JA's decision in ***Busby***. It is indeed correct that the suspended sentence imposed by the sentencing judge was quashed and substituted with an immediate term of twelve (12) months imprisonment. The possibility of a suspended sentence did not appear to have been ruled out though as the criticism of the sentencing judge was primarily that too much weight was placed on the appellant's interests and not enough weight was applied to the needs of society.

34. Moreover, it should be noted that the modern test for imposing a suspended sentence is having a "good reason" to do so. No longer does the Court need to be satisfied of the arguably higher and more onerous test of "exceptional circumstances" which were considered in the cited earlier authorities of *Kirby v Patrick Durham, Criminal Appeal No. 16 of 1988 (Court of Appeal of Bermuda)*, *Peter Duffy v Dawnie Louise Smith, Appellate Jurisdiction – No. 50 of 1995 (Supreme Court of Bermuda)*, and *Sanford Sampersad v. R, Appellate Jurisdiction No. 15 of 2001 (Supreme Court of Bermuda)*. I should point out that factually these cited authorities can be distinguished from the case at bar as the amount of money taken in those cases was considerably less than the amount stolen by the Defendant.

35. Considering the paragraphs heretofore I will now cast my attention to what the appropriate sentence in this case should be, and if a term of imprisonment whether it should be suspended in whole or in part.

Sentencing Decision

Mitigating Circumstances

36. Reviewing the circumstances of this case, particularly those which are in relation to the offence committed and those which are in relation to the Defendant personally, I find that there exist multiple mitigating features which should carry considerable weight in my sentencing decision. In particular:

The Defendant's plea of guilt: The Defendant pleaded guilty on 19th June 2019 and while the Court record indicates that the matter was sent from the Magistrates' Court to the Supreme Court's Arraignment Session scheduled on the 1st August 2018 there is no indication on the Court file that the Defendant was responsible for any delay or that she strategically withheld her guilty plea over that period of time. In fact, it would appear from notes of Court appearances and correspondence that the Defendant was awaiting vital disclosure of the Prosecution's used and unused material. I am therefore satisfied that the Defendant is entitled to the usual discount available for a guilty plea.

The Defendant's previous good character: Lord Lane LJ in *Barrick* noted that theft and fraud cases such as the ones committed by the Defendant are usually committed by persons of *"hitherto impeccable character".* Indeed, it could be said that it is by reason of the appearance of such erstwhile good character that offenders such as the Defendant and the appellant in *Barrick* are placed in a position of trust and authority and are then able to carry out their criminal acts. To be clear, the Defendant having no antecedent conviction history is a factor to which I will have due regard, but not to the extent that heavy weight would be applied to it given the nature of the offences committed.

I also have regard to the several heartfelt character references collated in Tab 17 of the Defendant's Bundle and I accept that the Defendant was and probably still is a hard-worker, dear friend, and a loving and caring mother, wife and sister.

The Defendant's genuine expression of regret and remorse: I accept the contents of the Social Inquiry Report dated 3rd September 2019 ("SIR") that the Defendant felt remorseful for her actions, and that she fully acknowledged that she broke the trust of her family and let her family down.

Restitution made by the Defendant: The fact that on the 4th July 2019 the Defendant made full restitution of the entire $110,759.93 stolen from CSI (proof of which is attached to the SIR), and thereby alleviated some of the financial suffering sustained by her employers, should be put into the balance. However, persons who have committed offences of theft and fraud whilst in a position of trust should disabuse themselves of the notion that by simply paying back the money which they have stolen that their likely sentence, whatever it may be, will be significantly reduced. Restitution should not be used as a significant restorative tool to evade a far less harsh sentence than that which the offender would have received had they not made the restitution. This is because while restitution may refill the coffers emptied by the offender, it does nothing to restore the breach of trust by the offender. I will therefore add the Defendant's restitution to any discount which I may be declined to grant the Defendant upon sentencing but it will by no means constitute a significant reduction.

The Defendant's low risk of re-offending: The SIR indicated that the Defendant is at a "very low risk of re-offending" and has a "very low need for rehabilitative services". On this basis I accept that the need to protect the community from the Defendant is not high.

37. While not strictly a mitigating circumstance, the Defendant's current mental health condition and her mental health status at the time of the commission of the offences are also factors which should rightly be given consideration. Ms. Mulligan emphasized that it was not her submission that the Defendant's mental health condition caused her to commit

the offences, but that the evidence was to show that the criminal conduct of the Defendant was part of a "perfect storm" that was brewing at the time. That being: the Defendant's own mental health decompensation which included suicidal ideations; the deterioration of her family member's mental health; and, her family's financial struggles and stressors. In support of her submission that the Defendant was labouring under a Bipolar Disorder when she committed the offences Ms. Mulligan called a Dr. Cherita Rayner, Clinical Psychologist at the Mid-Atlantic Wellness Institute in Bermuda ("MWI"), and a Dr. Chantelle Simmons, Acute Community Mental Health Services Sector Consultant Psychiatrist at MWI, to give oral evidence as to their clinical and psychiatric interactions with the Defendant. Referring to her report dated 17th September 2019 Dr. Rayner said:

- The Defendant stated that she had planned to engage in the theft until she got caught and that at that point she would follow through with her plans to complete suicide. Dr. Rayner could not speak to any suicidal ideations of the Defendant prior to 17th September 2019.

- The Defendant was found to be of low risk of engaging in future crimes of a similar nature and had moderate risk engaging in suicidal behaviours. However, the risk could increase should the Defendant's mental state deteriorate.

- Although the financial stressors that contributed to the Defendant's actions have not changed the Defendant's mental health between the date of the offences and the date of the assessment had improved and her sources of support had increased. In cross-examination Dr. Rayner said that the Defendant was much better in 2019 than she was in 2018.

- The Defendant's criminal behavior appears to be prompted by her feelings of being overwhelmed by the responsibility of her family and her subsequent suicidal ideation. In cross-examination Dr. Rayner accepted that suicidal ideations can exist independently of or simultaneously with criminal behavior.

38. Pursuant to a Court order dated the 24th July 2020 Dr. Simmons prepared a Psychiatric Report dated 10th August 2020 which was constructed from a series of questions agreed upon by both Prosecution and Defence Counsel (Defence Exhibit 1). Referring to this Psychiatric Report, Dr. Simmons gave oral evidence in examination-in-chief and cross-examination that:

- Since her suicide attempt the Defendant has been in active treatment with Dr. Simmons.

- The Defendant's prognosis for Bipolar Disorder is "fair".

- The Defendant has endorsed a long-standing desire to not be alive, however has maintained that she will not harm herself due to her children. Further, that on 20th March 2014 the Defendant reported increased suicidal ideation/thoughts resulting in a subsequent increased risk, and that on 22nd May 2018 her risk was assessed as high (the Defendant reported that she had discontinued her psychiatric medications a few months prior to the suicide attempt). Dr. Simmons concluded that her suicide attempt on the 21st May 2018 was serious from a medical perspective. Based on Dr. Simmons' clinical experience with the Defendant it was also her view that the Defendant might well carry out her suicidal ideations, but she accepted that over the years the Defendant's only suicide attempt was on the 21st May 2018.

- At the time of the offences and when the offences were discovered the Defendant was at risk for suicide and that at the time of her assessment on 6th August 2020 the Defendant was at a low risk for suicide (the Defendant was not having suicidal thoughts). Dr. Simmons stated that the 6th August 2020 was the first time that she had seen the Defendant's mind "straight down the middle" i.e. not manic or depressive (the psychiatric manifestations of Bipolar Disorder).

- Statements by the Defendant that her family would be "better off without her", that her family could use the money stolen for their living expenses, that her family

would be the beneficiaries of a large life insurance policy, that she needed a reason not to back out from committing suicide and end her depression, are consistent with the Defendant's clinical history. Dr. Simmons expressed that the Defendant did not discuss these plans for suicide with her and nor did she discuss her family's finances. The Defendant also did not tell Dr. Simmons why she stopped her medication, but since the latest suicide attempt Dr. Simmons has found the Defendant to be "open and transparent".

- It is recommended that the Defendant engage in a psychotherapy programme to assists with symptom management, develop appropriate coping skills, explore and resolve childhood trauma, and ongoing active management of the Defendant's psychiatric medication regime.

- If sentenced to a term of imprisonment the Defendant would be able to obtain psychiatric treatment, but that the nature of the environment would be anticipated to elevate her risk of mental health decompensation and associated suicidal ideation.

39. There is no doubt in my mind that prior to and at the time of the offences that the Defendant had been diagnosed with Bipolar Disorder, and, that although the Defendant is presently in a good mental space there is still psychiatric treatment and medication which should be administered for her. However, there is no or little evidence to suggest that between 8th March 2017 and 13th April 2018, i.e. the period over which the Defendant was stealing money from her employers, that the Defendant did not know or appreciate what she was doing on each of the multiple occasions when she was pocketing her employer's cash receipts and/or falsifying the Quick Books accounting system in order to conceal her defalcations. Therefore, I do not accept that there was a nexus between the Defendant's mental health condition and her commission of her offences.

40. I do however accept as a factor to be considered in any sentence which I may hand down that the Defendant has a history of suicidal ideations, a suicide attempt, recurring

manic/depressive manifestations of her Bipolar Disorder, and, that she still requires psychiatric monitoring and possibly intervention. However, I am not satisfied that the Defendant's mental health illness should be viewed as a major factor which would drastically reduce any appropriate sentence.

Aggravating Circumstances

41. It is unequivocal and without question to me that the aggravating features of this case outweigh the mitigating ones. Specifically:

The nature and seriousness of the offences: By virtue of the maximum sentences set out in sections 351(1) and 337(1) of the Criminal Code, respectively the false accounting and theft offences, as well as the manner in which such offences were dealt with in the authorities of ***Barrick***, ***Clark***, and ***Busby***, there should be no doubt that the offences for which the Defendant has pleaded guilty are to be viewed as very serious. The Defendant deliberately committed the offences over a lengthy period of a year and in doing so she had to deploy sophisticated planning to not only steal the cash that was being paid by CSI's customers, but most egregiously, to cover-up her thievery by falsifying Quick Books and transferring funds from FCE's bank account to CSI's bank account.

It has to be appreciated that "white-collar" crimes such as those committed by the Defendant should be seen as being more serious than the garden variety thefts that come before the Courts and for which custodial sentences are meted out. Thefts and fraud committed by employees not only have the potential of destabilizing the capital foundation upon which their company sits but could have the knock-on effect of putting other employees' employment into jeopardy. It is not surprising that Lord Lane CJ in ***Barrick*** called such offences "mean".

Therefore, it is vital that the sentence I impose will not only unequivocally denounce the Defendant's unlawful conduct, but that it would also fully deter the Defendant and other

employees who may contemplate committing theft and fraud offences when in a position of trust.

The quality and degree of trust reposed in the Defendant: For eight (8) years the Complainants handed over to the Defendant overall day-to-day operations of CSI and they had so much trust in her that they did not directly supervise her. It was this lack of supervision, which is probably now to the chagrin of the Complainants, that the Defendant took full advantage of to steal over $100,000 cash and to falsify accounting records over a fairly lengthy period of just over a year.

The damage or loss caused by the Defendant: Pursuant to section 63 of the Criminal Code the Complainants completed a Victim Impact Statement ("VIS") dated 20th November 2019[7] and in it they said, *inter alia*:

> *"It is sad to think that we spent all this time and resources trying to train and elevate someone who was stealing from us the whole time."*
>
> *"As Diedre was responsible for the bookkeeping of our contractor and retail business, her actions really left us in a lurch. Outside of the theft, to discover the many years of inefficiency has been truly disappointing."*
>
> *"The craziest thing is that because we were very cognizant of Deidre's personal struggles especially as it involved her financial situation, anytime Deidre would have come to us, we possibly would have lent her more money."*
>
> *"We think of the amount of time and resources spent with the accountant, police, warehouse manager, not to mention our time back and forth."*

As I said earlier, the restitution paid by the Defendant may have provided some solace for the Complainants financially, but it cannot repair the emotional and mental harm suffered by the Complainants whose business was left hanging in the balance, who had to expend time and resources to have the offences fully investigated by the police

[7] Tab 12 of the Prosecution's Bundle

authorities, and, who had to clean up years of inefficiency left by the Defendant so that she may clandestinely commit the offences charged.

Other factors to be taken into consideration or not

42. While they do not fall squarely within mitigating and aggravating circumstances I am obliged to take into consideration other factors in sentencing the Defendant. Such as:

The use to which the money stolen by the Defendant was put: Dr. Rayner spoke of the Defendant having financial stressors and Ms. Mulligan produced a purported schedule of the Defendant's income and expenses for the period March 2017 to April 2018 i.e. the period over which the offences were committed (the Defendant was said to be the breadwinner of the family). While the said schedule gives me a general idea of the Defendant's expenditure and income it does not assist me much in definitively arriving at where the $110,759.93 stolen from her employers was actually put. Firstly, the said schedule was not supported by documentation such as invoices, receipts, bank statements, etc. One would have thought that items such as utilities, health and car insurance, and loan repayments would have been easily obtainable.

Secondly, even if these expenditures are legitimate the Defendant was still receiving a salary from CSI. It therefore begs the question: "What and when were sums from the Defendant's salary being used to satisfy household expenses, and, what and when were sums from the money stolen being used to make up any shortfall?"

In the premises, while I am satisfied that some, and possibly most, of the money stolen was used by the Defendant to defray household expenses, I cannot be certain that at least some of the monies taken was not used for other non-essential purposes.

The impact on the Defendant's family: According to Dr. Simmons and a Dr. Heather Montgomery (in a letter dated 19th July 2019) the Defendant's immediate family members are also currently being treated psychiatrically and that the Defendant's absence, if

incarcerated, may have an adverse impact on them financially and mentally. It is further said that the Defendant is the primary breadwinner of her family, as well as the primary caregiver and support for her husband who suffers from a multitude of mental and physical ailments.[8] While possible hardship on the Defendant's family members is a factor to be considered it is a miniscule one. Persons who commit serious offences, such as those committed by the Defendant, should expect that their criminal actions may have a deleterious effect on their loved ones. Such a negative impact should be at the forefront of their minds when contemplating a criminal act and in turn serve as an internal deterrent to committing the criminal act. The Defendant committed the offences over the period of a year and multiple thefts of cash from the CSI's cash till, and throughout this time she could have, and probably should have, thought about the harm she may cause to her family. To now come before the Courts seeking a considerable reduction in sentence due to possible hardship of her family as a result of her committing the offences is quite interesting.

The Complainants' views on the sentence of the Defendant: In their VIS the Complainants stated:

> *"Despite all that we had to endure through this painful process, we believe in our heart that prison isn't the answer, but maybe the court cold appoint counselling and intervention and perhaps community service. We do believe that Diedre's time would be better served finding employment and being there for her son and daughter."*

I agree with Ms. Smith's submission that just because the Complainants appear to have compassion for the Defendant that that should not mean that she should escape a term of imprisonment if that sentence is warranted. To this, Ms. Smith further states and I concur, that there is still the aspect of deterrence and therefore any employee should not think that for offences of this nature that they will not be subject to incarceration because their employer may hold them in high regard. One can reasonably speculate whether the Complainants' would have felt the same way had the Defendant not made restitution to them.

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[8] See letters from Dr. Heather Montgomery dated 19th July 2019 found at Tab 17 of the Defendant's Bundle.

The delay in the Defendant being sentenced: Applying *Barrick*, I am obliged to have regard to the length of time that it has taken for the Defendant to reach this point of sentencing. As pointed out in my opening paragraphs there has been a delay in the Defendant's sentencing being completed and she should bear no responsibility for the delay. The Defendant should also not be faulted of the matter taking just under 2½ years from time the offences were discovered in May 2018 to the date of this sentencing.

Conclusion

43. Taking into consideration all of the mitigating and aggravating features of this case, as well as the guideline authorities, the appropriate sentence for each of the counts on the Indictment is **TWELVE (12) MONTHS IMPRISONMENT**.

44. I do however find that there is good reason to suspend part of this term of imprisonment. Specifically, the Defendant's mental health condition, the substantial restitution made by the Defendant, and the length of time that this matter has taken to progress. In this regard, I conclude that six (6) months of the imposed twelve (12) months should be suspended.

45. I considered whether a period of probation should follow any term of imprisonment but I ultimately decline to order such. I reach this decision due to the fact that (i) given the Defendant's mental health challenges she will in any event most likely be engaged in psychiatric/psychological treatment at MWI upon her release from custody, and (ii) the Defendant's risk of re-offending has been deemed to be low.

46. In the circumstances, I sentence the Defendant as follows:

<u>COUNT 1:</u> **TWELVE (12) MONTHS IMPRISONMENT WITH SIX (6) MONTHS SUSPENDED FOR A PERIOD OF TWO (2) YEARS.**

<u>COUNT 2:</u> **TWELVE (12) MONTHS IMPRISONMENT WITH SIX (6) MONTHS SUSPENDED FOR A PERIOD OF TWO (2) YEARS.**

BOTH SENTENCES TO RUN CONCURRENTLY

Dated the 10th day of September , 2020

The Hon. Acting Justice Juan P. Wolffe