COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
MCCrApp. No. 65 of 2018

B E T W E E N

DECARLA BULLARD
Appellant

AND

COMMISSIONER OF POLICE
Respondent

BEFORE:	**The Honourable Sir Brian Moree, CJ** **The Honourable Madam Justice Crane-Scott, JA** **The Honourable Mr. Justice Evans, JA**
APPEARANCES:	**Mr. Bjorn Ferguson, Counsel for the Appellant**
	Mr. Neil Brathwaite, Deputy Director of Public Prosecutions, Counsel for the Respondent
DATES:	**22 March 2021; 4 May 2021; 1 September 2021**

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Criminal appeal – Forgery – Uttering a forged document – Fraud by false pretences – Guilty plea – Guilty plea to an offence not known to law – Whether the charges were a nullity or whether the charge sheet was defective – Restrictions on appealing following a guilty plea – Unequivocal plea - Whether sentence unduly severe - Sections 348, 366 and 375 of the Penal Code - Sections 233, 251 & the Second Schedule of the Criminal Procedure Code

The appellant was charged before the Magistrate's Court with the offences of forgery, contrary to section 366 of the Penal Code (count one), uttering a forged document, contrary to section 375 of the Penal Code (count two) and fraud by false pretences, contrary to section 348 of the Penal Code (count 3). The particulars were that the appellant intended to evade the requirements of law (counts one and two) and that the appellant, with the intent to defraud, obtained cash from Scotiabank by false pretences (count three). To these charges the appellant pleaded guilty and was sentenced to 18 months' imprisonment on each count, to run concurrently.

The appellant now appeals her conviction on the basis that the magistrate erred by accepting her guilty plea as the offences with which she was charged are not offences known to law. The basis for this submission is that intent to evade is not one of the specified intents listed in section 366 (and applicable to section 375) of the Penal Code. She appeals her sentence on the basis that it is unduly severe.

Held: appeal allowed in part; convictions and sentences on counts one and two quashed and set aside. Conviction and sentence imposed on count three affirmed. The appellant is to immediately surrender herself into the custody of the Police to be transported to the Bahamas Department of Correctional Services; her sentence will commence on the day she is admitted into the Prison.

Counts one and two which were laid under sections 366 and 375 of the Penal Code are not known to law. Section 233 does not operate to bar an appeal in the circumstances. Count three is not infected by the malady from which counts one and two suffer. The guilty plea on this count was unequivocal.

Regarding the appeal against sentence on count three, the maximum sentence which may have been imposed was five years. The sentence of 18 months acknowledges the appellant's early guilty plea, her age and her previous good character. It cannot be considered unduly severe having regard to the circumstances of the case.

Caryn Moss v The Director of Public Prosecutions; The Director of Public Prosecution v Caryn Moss SCCrApp. & CAIS Nos. 230 & 238 of 2018 considered
Charles Williams v The Commissioner of Police MCCrApp. No. 57 of 2020 considered
Commissioner of Police v Angel Hudson (unreported) mentioned
Commissioner of Police v Anwar Johnson (unreported) mentioned
Donovan Rolle v Commissioner of Police MCCrApp. No. 145 of 2016 considered
Eric Anthony Delancy v Commissioner of Police MCCrApp. No. 236 of 2017 considered
Jihong Wang v The Commissioner of Police SCCrApp. No.171 of 2013 applied
Kostadin Karchav v The Commissioner of Police MCCApp. No. 56 0f 2015 mentioned
Krste Pavlovski and anor v. The Commissioner of Police MCCrApp. Nos. 32 & 33 of 2016 considered
New Southgate Metals Ltd v London Borough of Islington [1996] Crim LR 334 applied
R v Ayres [1984] AC 447 applied
R v Forde [1923] 2 K.B. 400 mentioned
Ziyang Li et. al. v The Commissioner of Police MCCrApp. No. 175 of 2019 applied

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J U D G M E N T

Judgment delivered by the Honourable Mr. Justice Evans, JA:

BACKGROUND

1. On 26 March 2018, the appellant was arraigned before Magistrate Derence Rolle Davis (hereinafter referred to as "the learned magistrate"), on the following counts:

"a. Forgery: contrary to Section 366 of the Penal Code, Chapter 84

The particulars are that the Appellant on Thursday, 22nd March, 2018, at New Providence, with intent to evade the requirements of the law; forged a certain document to wit: A Well Muddo Sik Limited cheque, authorizing you to receive $900.00 from Scotia Bank Ltd, Bay Street, purporting the same to be genuine.

b. Uttering a forged document: contrary to Section 375 of the Penal Code Chapter 84.

The Particulars are: That the appellant on Thursday 22nd March 2018 at New Providence with intent to evade the requirements of the law, uttered a certain forged document to wit: A Well Muddo Sik Limited Cheque to Scotiabank Limited Bay Street, Authorizing you to receive $900.00 in cash knowing the same to be forged.

c. Fraud by False Pretences: contrary to Section 348 of the Penal Code Chapter 84.

The particulars are that the Appellant on Thursday, 22nd March, 2018, at New Providence with intent to defraud obtained from Scotia Bank, Bay Street cash in the amount of $900.00 by means of false pretences." [Emphasis added]

2. The appellant appeared before the learned magistrate unrepresented. The charges were read to her, and she pled guilty to all three counts. The learned magistrate then sentenced the appellant to 18 months on each count and the sentences were to run concurrently.

THE APPEAL

3. On 29 March 2018, Criminal Form No. 1, Notice of Appeal Against Conviction and Sentence was filed on behalf of the appellant and on 22 March 2021 submissions were filed on behalf of the appellant seeking to challenge both her conviction and sentence.

4. The grounds were in the following terms:

"Ground 1: The learned Magistrate erred in law when he accepted the appellants (sic) plea to Forgery "with the intent to evade" notwithstanding this is not an offence found in the Penal Code, Chapter 84 of the Statue Laws of the Bahamas

Ground Two: That the sentences were unduly severe"

GROUND 1 – NOTWITHSTANDING SECTION 233 OF THE CRIMINAL PROCEDURE CODE, ARE THE CONVICTIONS AND SENTENCES ON COUNTS 1 AND 2 NULLITIES?

5. Ground 1 of the present appeal brings to the fore, once again, the issue as to what is the effect of a sentence imposed following a guilty plea, if it is determined that the offence to which the appellant pleaded guilty is not one which is known to the law. Can it be said that in the face of a guilty plea, section 233 of the Criminal Procedure Code ("CPC") is a bar to an appeal being launched where it is clear to the Court on the face of the appellate record that the offence to which the appellant has pled guilty and been sentenced for is not known to the law? In such circumstances, are the conviction and the associated sentence nullities?

6. Section 233 of the CPC provides**:**

> **"233. No appeal shall be allowed in a case in which the accused person has pleaded guilty and has been convicted by a magistrate's court on such plea, except as to the extent or legality of the sentence."**

7. This provision has received consideration by the Court of Appeal in several recent cases. I refer firstly to **Ziyang Li et. al. v The Commissioner of Police** MCCrApp. No. 175 of 2019, a case decided by this Court (differently constituted) just last year. In that case Barnett, P, who wrote the lead judgment, observed as follows:

> **"13. …In Twaddle v R Criminal Appeal No. 16 of 1969 this Court considered the ability of a person who pleaded guilty in the Magistrates Court to appeal that conviction. In a very short judgment this court set out the relevant law. It said:**
>
> **…**
>
> > **'It is clear from the authorities that where there has been an inequivocal (sic) plea of guilty before a magistrate an appellate court is not entitled to go behind the record to enquire whether or (sic) it was voluntary…**
> >
> > **The sole question is whether the appellant's answer to the charge as it appears in the record amounted to a deliberate plea of guilty. The plea was not ambiguous. It was a bare plea unaccompanied by any other statement as was the case in R. v Durham Quarter Sessions, Ex parte Virgo, (1952) 1 All E.R. 466 and it is manifest that his counsel, against whom**

> **no suggestion of improper conduct has been made, was not attempting to qualify it in any way when he addressed the magistrate. The plea was voluntary because the appellant had made up his mind to plead guilty, albeit on the advice of his counsel, and he cannot escape the restriction in section 228 of the Criminal Procedure Code. The appeal fails and is dismissed.'**
>
> **…**
>
> **15. We accept that if a guilty plea is equivocal and therefore not in fact a guilty plea or if it was not made voluntarily and therefore a nullity, the Court of Appeal may entertain an appeal from a conviction made in such a circumstance. That point was made by Lord Goddard in R v Durham Quarter Sessions ex P Virgo [1952] 2 Q.B. 1 where he said that the court could inquire whether the plea was in fact a guilty plea or an equivocal plea. That is not the case in this appeal. In our judgment it is clear on the record that the guilty plea was unequivocal and voluntarily made by the appellants. The appellants were represented by counsel who after the guilty plea made submissions in mitigation on their behalf.**
>
> **16. Section 233 is a complete bar to allowing an appeal against conviction in such a circumstance."**

8. In **Krste Pavlovski and anor v. The Commissioner of Police** MCCrApp. Nos. 32 & 33 of 2016, both appellants appeared unrepresented before the magistrate and pleaded guilty to drug offences. Notwithstanding the appellants' guilty pleas, this Court (differently constituted) quashed the appellants' convictions on the basis that in the light of the affidavit evidence before it, the appellants' guilty pleas were shown to be equivocal. At paragraph 24 of **Pavlovski**, this Court (by majority) considered the English decision of **R v Forde** [1923] 2 K.B. 400 and found that the principles laid down in **Forde** were not in conflict with section 233 of the CPC. The Court further held that a purported guilty plea is ineffective and void where the appellant did not appreciate the nature of the charge and did not intend to plead guilty. See also **Kostadin Karchav v The Commissioner of Police** MCCrApp. No. 56 of 2015.

9. In another case, **Eric Anthony Delancy v Commissioner of Police** MCCrApp. No. 236 of 2017 the appellant pled guilty before a magistrate and was convicted and sentenced on 8 counts under the Firearms Act and one count under the Dangerous Drugs Act. Notwithstanding section 233, Delancy sought an extension of time to appeal, inter alia, against the extent and legality of the sentences of 4 ½ years which the magistrate had imposed on counts 5-8 which had charged him of possession of an unlicensed firearm contrary to section 22(2) of the Firearms Act.

10. Delancy's submission on appeal in relation to counts 5-8 was that on the face of the record the sentences imposed had exceeded the prescribed penalty on summary conviction for an offence under section 22(2) of the Firearms Act.

11. After reviewing the legislative regime of the Firearms Act, the Court discovered that a fundamental difficulty with Delancy's convictions on counts 5-8 had been disclosed on the face of the record. The Court noted that section 22 was intended to provide a regime for the licensing of "firearms dealers" and that sub-section 22(2) was intended to provide a penalty on summary conviction for a person who **"by way of trade or business"** contravenes the Firearms Act by **"having in his possession for sale"** a firearm (not being a revolver) or ammunition **"without being registered as a firearms dealer."**

12. The Court of Appeal quashed Delancy's convictions and sentences on counts 5-8 being satisfied that despite his guilty pleas, the Statement of Charge under section 22(2) of the Charge Sheet did not align with the outline of facts which was more consistent with the commission of an offence under section 9 of the Firearms Act. Accordingly, the Court found that Delancy was, on the face of the appellate record, clearly not a person who "**by way of trade or business"** was **"in possession for sale"** of the magazine clips **"without being registered as a firearms dealer"**. Writing for the Court, Crane-Scott JA offered the following general guidance to judicial officers which is worthy of repetition given what occurred in the matter now under consideration:

> **"17. …A judicial officer is not only expected, but required (<u>even in cases where an accused pleads guilty</u>) to carefully check the legal provisions under which the charges are laid and to: <u>firstly, satisfy him/herself that the facts/evidence before the court align with the elements of the charge as laid;</u> and secondly, ensure that the penalty to be imposed falls within the statutory limits prescribed by law". [Emphasis added]**

13. More recently in **Charles Williams v The Commissioner of Police** MCCrApp. No. 57 of 2020, handed down on 28 June 2021, this Court (after reviewing the authorities) held that section 233 of the CPC could not operate to preclude an appeal against conviction having regard to the equivocal nature of the guilty plea. The Court acceded to the extension of time application and quashed an intended appellant's conviction on one of the counts being of the view that in the light of the outline of facts (which included the fact that Williams had denied that he sold drugs) Williams' guilty plea to that charge needed further clarification by the magistrate and was clearly equivocal. Williams had been unrepresented before the magistrate.

14. As the Court noted at paragraph 43 of **Ziyang Li et. al.**, this view of the scope of section 233 is consistent with fairness and a court doing justice. It is also consistent with section 200 of the CPC which allows the magistrate after hearing submissions which are not confined to mitigation, to find that there is sufficient cause not to proceed to convict and pass sentence. It

is clear therefore that before proceeding to convict there are several matters which a magistrate must consider, and it is only after having so addressed his/her mind that he/she should proceed to convict.

SUBMISSIONS

15. It is against this legal framework that I address the submissions of counsel. Mr. Ferguson, who appeared for the appellant, submitted that the three counts in the charge sheet to which the appellant pleaded guilty are not offences known to our law. He contended that the intents which give rise to the offences mentioned in Title XXV are listed in section 366 of the Penal Code. He notes that they are: **"with intent to defraud, or with intent to defeat, obstruct or pervert the course of justice or the due execution of the law".** Counsel concluded that as a result of this the charge read to the appellant does not exist at law and therefore the appellant could not have given a lawful plea. The magistrate, he said, failed in his legal duty to ensure that the appellant's right to the Constitutional provisions to secure protection of law were not infringed upon.

16. Mr. Ferguson also referred to Article 19(1) of the Constitution which provides: **"No person shall be deprived of his personal liberty save as may be authorized by law…".** He also referred to Article 20(4) of the Constitution which states that: **"No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence".**

17. It useful at this stage to set out the three provisions under which the appellant was charged and to which she pleaded guilty. These were as follows:

> "**348. Whoever defrauds any person by any false pretence shall be liable to imprisonment for five years.**
>
> **…**
>
> **366. Whoever <u>with intent to defraud</u>, or <u>with intent to defeat, obstruct or pervert the course of justice or the due execution of the law,</u> forges any document of any of the following kinds, namely, any will, any document of title to land, any judicial or official document, certificate or record, any power of attorney, any bank-note, bill of exchange, promissory note or other negotiable instrument, any policy of insurance, or any cheque, post office money order or other authority for the payment of money by a person carrying on business as a banker, shall be liable to imprisonment for ten years.**
>
> **…**

> **375. Whoever, with any of the intents mentioned in this Title, utters or in any manner deals with or uses any such document, stamp or coin as is in this Title mentioned, knowing the same to be forged, counterfeited, or falsified, as the case may be, or knowing the same not to be genuine, shall be liable to the like punishment as if he had with that intent forged, counterfeited or falsified, as the case may be, the document, stamp or coin." [Emphasis added]**

18. In support of his submissions Mr. Ferguson relied on the case of **Jihong Wang v The Commissioner of Police** SCCrApp. No.171 of 2013, a case decided by this Court (differently constituted). The facts of that case were similar but not identical to the present case. In that case the defendant had pleaded guilty to a charge of being in possession of a forged document with intent to deceive contrary to section 377 of the Penal Code. The Court of Appeal quashed the conviction upholding the appellant's submission that that the phrase **"intent to deceive"** is not one of the intents mentioned in section 366; nor is the intent spoken to in Title XXV. As such the Court concluded it was an offence not known to our law.

19. In response, Mr. Braithwaite submitted that the learned magistrate did not err in accepting the plea to the charges of forgery and uttering a forged document. In support of his position counsel refers to the provisions of section 76 of the CPC which provides as follows:

> **"76. (1) The provisions of the rules set out in the Second Schedule to this Code apply with respect to all charges and informations, and notwithstanding any rule of law or practice to the contrary, a charge or information shall not be open to objection in respect of its form or contents if it is framed in accordance with those rules:**
>
> **Provided that rules 1, 2 and 12 of the said rules shall not apply to charges tried by magistrate's courts and the formal matters and commencement in case of charges tried summarily shall be in conformity with the practice in use at the date of commencement of this Code until any other provision is made under any other law:**
>
> **Provided further that the said rules, in relation to their application to informations in the Supreme Court, may be added to, varied or revoked by the Rules Committee appointed under the Supreme Court Act.**
>
> **(2) Without prejudice to the provisions of subsection (1) of this section, no count shall be deemed objectionable or**

insufficient on any of the following grounds, namely that —

(a) it contains only one name of the accused;

(b) one name only or no name of the injured person is stated;

(c) the name or identity of the owner of any property is not stated;

(d) it charges an intent to defraud without naming or describing the persons whom it was intended to defraud;

(e) it does not set out any document which may be the subject of the charge;

(f) it does not set out the words used where words used are the subject of the charge;

(g) the means by which the offence was committed is not stated;

(h) the district in which the offence was committed is not stated; or

(i) any person or thing is not described with precision:

Provided that, if it appears to the court that the interests of justice and the avoidance of prejudice to the accused person so require, the court shall order that the complainant or the prosecutor shall furnish particulars further describing or specifying any of the foregoing matters". [Emphasis added]

20. As has been noted, rules 1, 2 and 12 have no application to matters tried by a magistrate as such. I will set out the relevant portions of the rules set out in the Second Schedule of the CPC beginning at rule 3 and ending at 11. They are in the following terms:

"3. (1) A description of the offence charged in a charge or information, or where more than one offence is charged, of each offence so charged, shall be set out in a separate paragraph called a count.

(2) A count shall commence with a statement of the offence charged, called the statement of offence.

(3) The statement of an offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and, if the offence charged is one created by Act, shall contain a reference to the section of the Act creating the offence.

(4) After the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary:

Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in an information, nothing in this rule shall require any more particulars to be given than those so required.

(5) Where a charge or information contains more than one count, the counts shall be numbered consecutively.

4. (1) Where an Act constituting an offence states the offence to be the doing or the omission to do any one of any different acts in the alternative, or the doing or the omission to do any act in any one of any different capacities, or with any one of any different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities or intentions or other matters stated in the alternative in the enactment may be stated in the alternative in the count charging the offence.

(2) It shall not be necessary, in any count charging a statutory offence, to negative any exception or exemption from, or qualification to, the operation of the Act creating the offence.

5. (1) The description of property in a count shall be in ordinary language and such as to indicate with reasonable clearness the property referred to, and if the property is so described it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property.

(2) Where property is vested in more than one person, and the owners of the property are referred to in a charge or information, it shall be sufficient to describe the

property as owned by one of those persons by name and with others, and if the persons owning the property are a body of persons with a collective name, such as "Inhabitants", "Trustees", "Commissioners" or "Club", or such other name, it shall be sufficient to use the collective name without naming any individual.

6. The description or designation in a charge or information of the accused person, or of any other person to whom reference is made therein, shall be such as is reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree or occupation and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, such description or designation shall be given as is reasonably practicable in the circumstances, or such person may be described as "a person unknown".

7. Where it is necessary to refer to any document or instrument, it shall be sufficient to describe it by any name or designation by which it is usually known, or by the purport thereof without setting out any copy thereof.

8. In a count in respect of an offence for engraving, or making the whole or any part of any instrument, matter or anything whatsoever, or for using or having the unlawful possession of any plate or other material upon which the whole or any part of any instrument, matter or thing whatsoever shall have been engraved or made, or for having the unlawful possession of any paper upon which the whole or any part of any instrument, matter or thing whatsoever shall have been made or printed, it shall be sufficient to describe such instrument, matter or thing by any name or designation by which the same may be usually known, without setting out any copy or facsimile of the whole or any part of such instrument, matter or thing.

9. In a count in which it shall be necessary to make any averment as to any money, or any currency note, it shall be sufficient to describe such money or currency note simply as money, without specifying any particular coin or bank note; and such allegation so far as regards the description of the property shall be sustained by proof of

> **any amount of coin, or any bank note, although the particular species of coin of which such amount was composed or the particular nature of the bank note shall not be proved; and in cases of embezzlement, and obtaining money or bank notes by false pretences, by proof that the offender embezzled or obtained any pieces of coin, or any bank note, or any portion of the value thereof, although such piece of coin or bank note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to any other person and such part shall have been returned accordingly.**
>
> **10. Subject to any other provisions of these Rules, it shall be sufficient to describe any place, time, thing, matter, act or omission whatsoever, to which it is necessary to refer in any charge or information, in ordinary language in such a manner as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to.**
>
> **11. It shall not be necessary in stating any intent to defraud, deceive or injure to state an intent to defraud, deceive or injure any particular person where the statute creating the offence does not make any intent to defraud, deceive or injure a particular person an essential ingredient of the offence." [Emphasis added]**

21. It is rule 3(3) under which Mr. Braithwaite seeks to find shelter. He submits that the particulars contained sufficient information to enable the appellant to understand that there was a forged cheque allegedly from A Well-Mudo Sik Ltd., authorizing her to receive $900.00 from Scotia Bank Ltd., Bay Street. It follows that she understood the charges against her in non-technical language. He further submits that in any event the submissions made by Mr. Ferguson could not apply to the third count where intention was not an issue but rather the completed act of committing fraud by false pretences.

22. It is noted, however, that Mr. Braithwaite's submission does not appear to give consideration to rule 4(1) which states that:

> "**4 (1) Where an Act constituting an offence states the offence to be the doing or the omission to do any one of any different acts in the alternative, or the doing or the omission to do any act in any one of any different capacities, <u>or with any one of any different intentions</u>, or states any part of the offence in the alternative, the acts, omissions, capacities or intentions or other matters stated**

in the alternative in the enactment may be stated in the alternative in the count charging the offence." [Emphasis added]

23. It would be obvious that the mere reference to section 366 of the Penal Code will not suffice to alert a defendant as to which intent it is being alleged constituted the offence for which he is being called to answer. In dealing with section 375 the absence of the mention of the specific intent is not as problematic as that section refers to "**any of the intents mentioned in this Title".** However, a defendant is still left to figure out which intent is being relied upon by the Crown. This problem may be resolved when the facts are read and the picture becomes clearer.

24. The real problem in my view comes about when an intent is specified but that intent is not one specified by the Penal Code. This, to my mind, raises the issue as to whether the charge is merely defective or whether it is a nullity. Mr. Braithwaite argues that the appellant understood the charges against her which were laid in non-technical language and thus he says that she never suffered any miscarriage of justice, nor was she prejudiced. This led him to his fallback position that in any event this is a proper case for the application of the proviso.

25. This issue was dealt with in the case of **R v Ayres** [1984] AC 447 where in the lead judgment of Lord Bridge of Harwich, the House of Lords held that:

> **"In a number of cases where an irregularity in the form of the indictment has been discussed in relation to the application of the proviso a distinction, treated as of crucial importance, has been drawn between an indictment which is "a nullity" and one which is merely "defective." For my part, I doubt if this classification provides much assistance in answering the question which the proviso poses. <u>If the statement and particulars of the offence in an indictment disclose no criminal offence whatever or charge some offence which has been abolished, in which case the indictment could fairly be described as a nullity, it is obvious that a conviction under that indictment cannot stand. But if the statement and particulars of offence can be seen fairly to relate to and to be intended to charge a known and subsisting criminal offence but plead it in terms which are inaccurate, incomplete or otherwise imperfect, then the question whether a conviction on that indictment can properly be affirmed under the proviso must depend on whether, in all the circumstances, it can be said with confidence that the particular error in the pleading cannot in any way have prejudiced or embarrassed the defendant."</u> [Emphasis added]**

26. Mr. Braithwaite sought further assistance from section 251 of the CPC which provides that:

> **"251. No judgment shall be given in favour of the appellant if the appeal is based on an objection to any information, complaint, summons, or warrant for any alleged defect therein in matter of substance or for any variance between such information, complaint, summons or warrant and the evidence adduced in support thereof, unless it be proved that such objection was raised before the magistrate's court whose decision is appealed against". [Emphasis added]**

27. Section 251 seems like a draconian provision especially when dealing with a defendant who is unrepresented. In this regard I note the decision in **New Southgate Metals Ltd v London Borough of Islington** [1996] Crim LR 334, where the Court considered the application of section 123 of Magistrates' Court Act 1980 which is in pari materia with section 251 of the CPC. In that case the court discussed the effects of errors or defects in charges or informations, observing that:

> **"Where the defect is substantial enough to require amendment then the magistrates have power to allow such amendment, provided always that an adjournment should be granted if the defence are thereby placed at any disadvantage as a result. On the other hand, if the prosecution, on whom the conduct of the case is vested, fail to detect the error and make the appropriate application then any conviction obtained upon such a defective information runs the risk of being brought up before this court and quashed. Examples of that procedure appear in Hunter v Coombes (1962) 1 W.L.R. 573. However if, as Lord Widgery pointed out, the error is so trivial that no amendment is required and it is apparent that the defence will always be aware of the true basis of the complaint then the conviction may be upheld even on an unamended information.**
>
> **...**
>
> **The clear conclusion that I have come to in this case, is that the error in this information was trivial in nature and in no way misled or disadvantaged the defence and did not invalidate the conviction that was based on that erroneous information, even though it did not stand**

amended at the time the conviction was entered". [Emphasis added]

28. At the end of the day, we come back to the question as to whether the charges were a nullity in that they do not exist in law or whether there was a simple defective charge sheet which could easily be amended. This also brings us squarely to the question as to whether there is a basis for distinguishing this Court's decision in **Jihong Wang** from the present case. The Court in that case was clear in its finding as indicated in the headnote that:

> **"It is readily seen that the phrase "intent to deceive" is not one of the intents mentioned in section 366; nor is the intent spoken to in Title XXV. Notwithstanding that the facts accepted by the appellant clearly disclose that he knew the permanent resident certificates were forged and they were in his possession; and there was evidence that in the appellant's passport was a duplication of the permanent resident stamps bearing the same number and face of the appellant and that he travelled on the passports, the offence charged is not one known to the law".**

29. The Court in **Jihong Wang** then concluded that:

> **"30. We are satisfied that recourse to section 15(2) of the Act would not be appropriate in this case because the charge as laid is not one known to the law and is thus a nullity; and as stated by Lord Denning in Macfoy v United Africa Company Limited (West Africa) [1961] 3 All ER 1169:**
>
> > **'You cannot put something on nothing and expect it to stay there.'**
>
> **31. In the premises, therefore, we allow the appeal and quash the conviction…"**

30. It is noted that the Court in **Jihong Wang** does not appear to have been referred to either sections 233 or 251 of the CPC. However, in my view, if the charges laid against the appellant were a nullity, then those provisions can provide no solace for the Crown. In this regard it is important to note that the appellant herein appeared unrepresented before the Magistrate's Court. In these circumstances the magistrate had a duty to be alert to his responsibility to protect the appellant's right to a fair trial.

31. Firstly, as noted in the case of **Eric Anthony Delancy**:

> **"17. …<u>A judicial officer is not only expected, but required (even in cases where an accused pleads guilty) to carefully</u>**

> **check the legal provisions under which the charges are laid and to: firstly, satisfy him/herself that the facts/evidence before the court align with the elements of the charge as laid; and secondly, ensure that the penalty to be imposed falls within the statutory limits prescribed by law..,,". [Emphasis added]**

32. Secondly, as stated in **New Southgate Metals Ltd**:

> "**Where the defect is substantial enough to require amendment then the magistrates have power to allow such amendment, provided always that an adjournment should be granted if the defence are thereby placed at any disadvantage as a result. On the other hand, if the prosecution, on whom the conduct of the case is vested, fail to detect the error and make the appropriate application then any conviction obtained upon such a defective information runs the risk of being brought up before this court and quashed…" [Emphasis added]**

33. In these circumstances, I am prepared to follow the ratio in **Jihong Wang** and apply it to the first two charges which were purportedly laid under sections 366 and 375 of the Penal Code. I am unable, however, to accept Mr. Ferguson's submission that the same principles can apply to the third charge which was laid under section 348 of the Code. There is clearly no defect in that charge and as each charge must be considered separately it is not infected by the malady from which counts 1 and 2 suffer.

34. In summary, I am of the view that based on the law as I understand it, a sentence imposed following a guilty plea, is not a lawful sentence if the offence to which the appellant pleaded guilty is not one which is known to the law. Even in the face of a guilty plea, section 233 of the CPC is no bar to an appeal being launched where it is clear to the Court on the face of the Record that the offence for which the appellant has pled guilty and been sentenced is not known to the law.

35. As a result, I would hold that section 233 is not a bar to the appellant being able to appeal against the magistrate accepting guilty pleas for counts 1 and 2 which, as laid, charge offences which do not exist in our law. The convictions on those two charges in my view should be quashed and the sentences set aside. However, count 3 was properly laid and there is nothing equivocal or unlawful about the appellant's guilty plea and subsequent conviction and sentence on that charge. The appeal against the conviction on count 3 is dismissed.

GROUND 2 – ARE THE SENTENCES UNDULY SEVERE?

36. On ground 2 the appellant complains that the concurrent custodial sentences of 18 months which the magistrate imposed in respect of counts 1, 2 and 3 are unduly severe. However, in the light of our decision on ground 1 that the convictions and sentences in respect of counts 1 and 2 were nullities and should be set aside, it is obvious that our focus on ground 2 is now limited only to considering whether the sentence of 18 months on count 3 is unduly severe.

37. The manner in which the Court of Appeal approaches the review of sentences imposed in the court below is pretty well settled. In **Caryn Moss v The Director of Public Prosecutions; The Director of Public Prosecution v Caryn Moss** SCCrApp. & CAIS Nos. 230 & 238 of 2018 the Court (differently constituted) explained:

> **"86. …In approaching matters of this nature we are always mindful of the principle that an appellate court should be slow to interfere with the exercise of trial (sic) judge's discretion and should not interfere unless some error in principle has been disclosed. This principle is as old as the guidance given by Lord Hewart, LC in the case of *Gumb*s (1927) 19 Cr. App. R. 94 where he stated as follows:**
>
> > **'Two principles from time to time have been mentioned in this Court, and in some cases they may have to be considered together. One is that this Court never interferes with the discretion of the Court below merely on the ground that this Court might have passed somewhat different sentence: for this Court to revise sentence there must be some error in principle.'"**

38. In **Donovan Rolle v Commissioner of Police** MCCrApp. No. 145 of 2016, the appellant, a former prison officer, was convicted (following a trial) of the offence of causing damage to the cellular phone jamming device installed on the eastern block of the Department of Corrections. He appealed his conviction as well as his sentence. His appeal against his conviction and sentence was dismissed.

39. In affirming Rolle's sentence, Isaacs JA (writing the Court's decision) stated:

> **"46. …the appellant faced a daunting task of seeking to convince us that the sentence was "unduly severe". <u>A sentence is unduly severe if it falls outside of the realm of sentences which would be reasonable in like circumstances.</u> It must be noted that the maximum sentence the appellant faced was two years. He received a**

> **one year sentence and a payment of compensation equal to the estimated value of the device.**
>
> **47. We were not provided with any comparators by which we could measure the severity or otherwise of the sentence, but having gone through a trial and been found guilty, the appellant could not expect to receive the same level of leniency as a person who pleads guilty at the earliest opportunity. Further, the appellant breached his position of trust which may have had the dire consequences mentioned by the magistrate…" [Emphasis added]**

40. **Rolle** is obviously distinguishable from the current appeal on the basis, inter alia, that the sentence was imposed following a trial and not (as here) after a guilty plea. Nonetheless, the case usefully explains what must be established by any appellant who seeks to rely on the statutory ground that the magistrate's sentence is "unduly severe". [see section 14 (1) (j) Court of Appeal Act, Chapter 52.]

41. In his written submissions, Mr. Ferguson referenced two Magistrates' Court cases, namely, **Commissioner of Police v Anwar Johnson** (unreported) and **Commissioner of Police v Angel Hudson** (unreported) where the convicts were sentenced respectively to 2 years in one case; and in the other, to 6 months together with a compensation order. In moving ground 2, Mr. Ferguson submitted that the appellant was 6 months' pregnant at the time of her guilty plea. He further contended that an appropriate sentence in the circumstances should have been a compensation order and probation.

42. In response, Mr. Braithwaite argued that the sentences imposed were not "unduly severe" as the aggravating circumstances outweighed the mitigation. He further contended that the record does not reflect that the appellant brought it to the attention of the court that she was 6 months pregnant. He concluded by noting that the learned magistrate took into account the appellant's guilty plea, her age and lack of criminal record. However, he contended that on the other hand the appellant, who had been employed for 10 days, had breached the employer's trust by stealing and committing fraudulent acts. In the circumstances, he submitted that 18 months out of a possible 60 months was reasonable. I agree.

43. In his sentencing remarks the learned magistrate said:

> **"Defendant appeared pleaded guilty and accepted facts. Having pleaded guilty to the charge it goes to her credit she is a young woman 34 years old. She was employed with the company Sharkies for a mere 10 days when she committed this most egregious act.**

She has breached a sacred trust as an employee when she stole and committed these fraudulent acts, the society must be protected from such behavior

The court is satisfied that a greater penalty should be levied than what has been given, having regard to her mitigating circumstances it is your 1st offense and therefore only this minimum penalty has been prescribed rather than a five (5) year penalty to which I would have given had the aggravating circumstances out-weighed the mitigating factors.

Right to appeal decision within 7 days

Convictions: FORGERY - S. 366 of Chapter 84; — 18 months at B.D.O.C.S;

UTTERING – S. 375 of Chapter 84; — 18 months at B.D.O.C.S;

FRAUD - S. 348 of Chapter 84; — 18 months at B.D.O.C S…"

44. The maximum sentence which may be imposed for fraud by false pretences under section 348 of the Penal Code is five (5) years. I can find no fault with the learned magistrate's finding that the aggravating circumstances of the offence did not outweigh the mitigating factors. As the magistrate correctly found, the appellant had been employed for a mere 10 days before she committed the offences thereby breaching her employer's trust. Based on his sentencing remarks it is obvious that the magistrate took into account by way of mitigation the appellant's guilty plea, her young age and the fact that this was her first offence meaning that she was previously of good character.

45. In assessing the reasonableness of the sentence and whether it was unduly severe, I am satisfied that it is usual for a deduction of one-third (1/3) to be made from the statutory maximum to take account of a guilty plea. It would therefore have been reasonable for a deduction of up to 20 months to have been made from the maximum of 60 months on account of the guilty plea. By ultimately arriving at a sentence of 18 months, it is evident that the learned magistrate thereafter credited the appellant with what is, in my view, an overly generous 22 months simply on account of her good character and young age.

46. The question we have to consider is: can it really be said that 18 months falls outside the realm of sentences which would be reasonable in like circumstances and is therefore "unduly severe"? I think not.

47. While the exact circumstances of the two Magistrates' Court cases referenced by Mr. Ferguson are not known and do not assist as comparators, I am satisfied that the sentence of

18 months (i.e. 1 year and 6 months) falls within the range of sentences which have been imposed for similar offences involving stealing by reason of employment. The appellant complains that the magistrate did not take account of the fact that she was 6 months pregnant. However, nothing in the Magistrate's Notes or in his sentencing remarks indicates that he was informed that the appellant was 6 months pregnant or that he had/had not taken this fact into account by way of further personal mitigation. I take the view that even if the magistrate had been advised of that fact, given the very aggravating circumstances of the offence and the already generous credit of 22 months which she received on account of her personal mitigation, the sentence of 18 months is neither unreasonable nor "unduly severe".

48. In the circumstances, I would dismiss ground 2 and affirm the appellant's 18-month sentence which the magistrate imposed on count 3.

DISPOSITION

49. For all the foregoing reasons, the appeal is allowed on ground 1. The appellant's convictions and sentences relative to counts 1 and 2 are accordingly quashed and set aside. The appeal is, however, dismissed on ground 2 and her conviction and the 18-month sentence imposed in respect of count 3 are affirmed.

50. As the appellant is presently on bail and has been on bail pending appeal following her conviction, her bail is revoked with immediate effect. The appellant is to immediately surrender herself into the custody of the police at the Central Police Station or any other Police Station to be transported to The Bahamas Department of Correctional Services ("the Prison") where she will begin serving her 18-month sentence relative to count 3. The appellant's sentence will commence on the day she is admitted into the Prison.

The Honourable Mr. Justice Evans, JA

51. I agree.

The Honourable Sir Brian Moree, CJ

52. I also agree.

The Honourable Madam Justice Crane-Scott, JA