**JAMAICA**

**IN THE COURT OF APPEAL**

**RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 12/2010**

**BEFORE:** **THE HON. MRS JUSTICE HARRIS, J.A.**
**THE HON. MRS JUSTICE McINTOSH, J.A. (Ag)**
**THE HON. MR JUSTICE BROOKS, J.A. (Ag)**

**CURTIS ELLIS v REGINA**

**Donald Bryan for the appellant**

**John Tyme for the Crown**

**13 and 30 July 2010**

**BROOKS, J.A. (Ag)**

[1] On 13 July 2010 we heard the appeal against sentence in respect of this matter. After hearing the submissions we ruled that the appeal should be allowed, the sentences set aside and other sentences imposed in their stead. We then promised to put our reasons, for so doing, in writing. We now fulfil that promise.

[2] On 15 December 2006, the appellant Mr Curtis Ellis, pleaded guilty to all five counts on an indictment which was proffered against him in the

Resident Magistrate's Court for the Corporate Area. He was sentenced to serve a maximum of ten years imprisonment at hard labour. His dissatisfaction with the sentences has led to this appeal.

[3] The offences with which the appellant was charged were all contrary to the Forgery Act and were as follows:

a. Count 1 – Forgery committed on 14 December 2006 – contrary to section 4(2)(a).

b. Count 2 – Uttering a forged document on 19 December 2006 – contrary to section 9(1).

c. Count 3 – Uttering a forged document on 14 December 2006 – contrary to section 9(1).

d. Count 4 – Attempting to obtain money by virtue of a forged document on 14 December 2006 – contrary to section 10.

e. Count 5 – Obtaining money by virtue of a forged document on 14 December 2006 – contrary to section 10.

It appears that the date for count two was incorrectly written on the indictment. The offence was, apparently, committed on 14 December 2006 as was stated on the relevant information which grounded that particular count on the indictment.

[4] The sentence for each count was five years imprisonment. Counts one and five were, however, ordered to run consecutively, while the

sentences for all the other offences were to run concurrently with one or other of those counts. The resulting total was a sentence of ten years.

[5] The prosecution asserted that the appellant had forged a Jamaican passport and a City of Kingston Co-operative Credit Union identification card. On 14 December 2006, he used them in obtaining $100,000.00 from the credit union. He again used the documents, on the same day, in attempting to secure a further sum of money from the institution but his attempt was foiled and he was arrested and charged.

**The submissions**

[6] Mr Bryan, on behalf of the appellant, has submitted that the sentences were wrong in principle and were excessive. He submitted:

a. A passport is not one of the documents contemplated by section 4(2)(a) of the Forgery Act. It is instead, section 6 which is the appropriate section.

b. The maximum sentence allowed by section 6 is two years imprisonment.

c. The punishment for uttering a forged document contrary to section 9 of the Forgery Act is determined by the type of document which has been forged. No section specifically contemplates the forgery of an identification card and therefore section 7 applies. The forgery of a document contemplated by section 7 is not a felony and therefore the uttering of such a

document is a misdemeanour only. The maximum sentence allowed for the latter offence is two years.

d. By the same reasoning, since the maximum sentence for the offence of forging a Jamaican passport is two years, the offence of uttering such a forged passport can only attract a maximum punishment of two years imprisonment.

e. Section 10 of the Forgery Act does not criminalise an attempt to obtain money by means of a forged document.

f. The learned Resident Magistrate, in imposing the same penalty for each, failed to distinguish between the substantive offence of obtaining money by means of a forged document and the inchoate offence of attempting to commit that offence.

[7] Mr Bryan also submitted that the sentences imposed were manifestly excessive in that each was above the average sentence imposed for that type of offence. He also complained that, in any event, there should not have been a consecutive element included. He stated that the sentences were excessive despite the fact that the appellant had had previous convictions for offences involving dishonesty.

**The Jurisdiction**

[8] We are of the view that Mr Bryan's submissions in respect of the counts involving the forgery and the uttering are valid and should

succeed. Whereas section 4(2)(a) of the Forgery Act contemplates the forgery of "any valuable security or assignment thereof or endorsement thereon, or" an endorsement on a bill of exchange, section 6 specifically speaks to forgery of a passport. Section 6 states, in part:

> "The forgery of any passport...shall be a misdemeanour, and punishable with imprisonment with hard labour for any term not exceeding two years."

The order for the indictment should, therefore, have specified section 6, and not section 4(2)(a) in respect of the forgery of the passport.

[9] The appellant was therefore, charged under the wrong section of the Forgery Act. It is incumbent on this court to amend the indictment to reflect the appropriate section.

[10] The power to amend the indictment is granted by section 302 of the Judicature (Resident Magistrates) Act, and the exercise of the power in these circumstances was approved by their Lordships in the Privy Council case of ***Director of Public Prosecutions v Stewart*** (1982) 35 WIR 296 at page 301.

[11] Based on the foregoing, count one of the indictment is therefore amended by deleting the numerals and letter "4(2)(a)" and substituting therefor, the numeral 6.

[12] We now turn to the matter of the identification card. Although the appellant was not indicted for the offence of forgery of the identification card, it is necessary to determine the section under which such an offence would fall. This is because, as Mr Bryan submitted, the type of document forged determines the penalty for the offence of uttering such a document.

[13] The offence of forgery of an identification card clearly does not fall within the contemplation of section 4(2)(a) which has been cited above. Nor does it fall within the contemplation of any other section which creates an offence for forgery of a specific type of document or other item. Section 7 of the Act provides a type of residuary provision and is applicable where a document is not specifically mentioned in any of the other relevant sections of the Act. Section 7 states:

> "Forgery of any document which is not made felony under this or any other enactment for the time being in force, if committed with intent to defraud or deceive, shall be a misdemeanour, and punishable with imprisonment with hard labour for any term not exceeding two years."

It would seem therefore that section 7 is the applicable provision for the forgery of the identification card.

[14] Mr Bryan's submission that section 10 of the Forgery Act does not criminalise an attempt to commit the offence is, however, not well

founded. Firstly, section 10 does create, as an offence, an 'endeavour' to receive any money or other property by virtue of a forged instrument.

> "Every person shall be guilty of felony, and on conviction thereof shall be liable to imprisonment with hard labour for any term not exceeding fourteen years, who, with intent to defraud, demands, receives, or obtains, or causes or procures to be delivered, paid, or transferred, to any person, or endeavours to receive or obtains or to cause or procure to be delivered, paid, or transferred, to any person, any money, security for money, or other property, real or personal-
>
> (a) under, upon, or by virtue of, any forged instrument whatsoever, knowing it to be forged..."

Secondly, even if section 10 did not include the aspect of an 'endeavour', section 50 of the Interpretation Act stipulates that an "attempt" is also deemed an offence. Section 50 states:

> "A provision which constitutes an offence shall, unless the contrary intention appears, be deemed to provide also that an attempt to commit such offence shall be an offence against such provision, punishable as if the offence itself had been committed."

[15] We now turn our attention to the sentences which were imposed.

**The sentences**

[16] The maximum sentence permitted for offences contrary to sections 6 and 7 respectively is two years imprisonment. Those penalties, by virtue of section 9, determine the penalty for the offence of uttering forged documents of those types. Section 9(1) states that an offender against its

provisions, "on conviction thereof shall be liable to the same punishment, as if he himself had forged the document, seal or die". The penalty for uttering a forged passport and for uttering a forged identification card respectively is, therefore, two years imprisonment.

[17] Section 10 of the Forgery Act, stipulates that the maximum sentence, in respect of the offence of obtaining by means of a forged document, is fourteen years imprisonment at hard labour. A Resident Magistrate may, however, only impose a maximum sentence of three years (see section 268(2) of the Judicature (Resident Magistrates) Act).

[18] Based on the foregoing analysis, the learned Resident Magistrate was only entitled to impose the following maximum sentences:

a. two years each for counts one, two and three;

b. three years each for counts four and five.

She therefore exceeded her jurisdiction in imposing the individual sentences which she did. What therefore, are the appropriate sentences to be imposed?

[19] The learned Resident Magistrate in her reasons for judgment stated:

> "The accused showed no remorse for his actions but rather sought to justify it (sic) and had been imprisoned for the same offences before. The court felt he should receive condign punishment for his misdeeds..."

Although that passage explains the imposition of the maximum sentences under the indictment as framed, she did not specifically explain the rationale for the consecutive sentences.

[20] There is no gainsaying that the forgery and fraudulent use of a Jamaican passport are serious offences. A passport is a symbol, declaring that the holder is under the protection of the state (see ***Rex v Brailsford and another*** [1905] 2 KB 730, 745 - approved in ***Dabdoub v Vaz and others*** SCCA Nos. 45 and 47/2008 delivered 13 March 2009). A passport should never be associated with illegality. The use of a forged passport was, nonetheless, an integral aspect of the commission of each of the offences involved in the instant case.

[21] We now address the consecutive aspect of the sentences. Where offences are committed as part of the same transaction, sentences are usually stipulated to run concurrently. (***Regina v Walford Ferguson*** (SCCA No. 158/1995 – delivered 26 March 1999). Similarly, where the offences are of a similar nature and were committed over a short period of time, against the same victim, sentences should be made to run concurrently (see ***R v Paddon*** (3 March 1971) Current Sentencing Practice A5.2(b)).

[22] It is permissible to impose consecutive sentences where the commission of the offence or the character of the offender is associated with such behaviour that particularly severe sentences are required. This

principle usually applies where the maximum sentence provided by a statute is not sufficient to register the appropriate level of disapproval which the court ought to show (see ***R v Sydney George Wheatley*** (1983) 5 Cr. App. R. (S) 417). It is to be noted, however, that regardless of the type of sentence contemplated, the sentencer, in determining appropriateness, must always consider the effect of the total sentence on the offender (***Regina v Walford Ferguson*** cited above).

[23] Before applying those principles to the instant case, it should be noted that it appears that the offence grounding count five was committed on the same day, as that for count four. $100,000.00 was obtained on the first occasion and sometime thereafter, an attempt was made to secure more money ($10,000,000.00, according to the information and the indictment, but $10,000.00 as recorded in the learned Resident Magistrate's reasons for sentencing). The offences may therefore, be considered part of the same transaction (see ***R v Paddon***).

[24] In applying the abovementioned principles, the following circumstances must be considered in determining the appropriate sentence:

a. all the offences were committed on the same day, against the same victim, and so can be said to stem from the same transaction;

b. the appellant has several previous convictions for dishonesty;

c. there was no violence involved in the commission of the offences;

d. the appellant pleaded guilty and did not waste the court's time;

e. the offences were not associated with egregious behaviour;

f. the appellant displayed no remorse for his actions;

g. a Jamaican passport was used to perpetrate the offences.

Based on factors a, c, d and e above, we find that consecutive sentences would not be appropriate. There are, however, in items b, d, f and g, sufficient aggravating factors to warrant the imposition of the maximum sentence for each count. The fact that the appellant had previous convictions for offences of the same nature (the details of which were not before us), and the fact that he displayed no remorse for his actions, are prominent among those latter factors.

[25] In considering the total sentence of three years which results, it could not be said that it is too harsh or excessive. It may be on the lenient side, considering the appellant's previous convictions, but to impose a consecutive element to the sentence may be considered to be punishing him twice on that account.

**Conclusion**

[26] It is for those reasons that we ruled as we did on 13 July 2010. The ruling then made, was as follows:

1. The appeal against sentence is allowed, the sentences are set aside and the following sentences imposed in their stead:
    a. in respect of each of counts one, two, and three, two years imprisonment at hard labour;
    b. in respect of counts four and five respectively, three years imprisonment at hard labour;
    c. the sentences shall run concurrently.
2. The appellant should be released immediately.

[27] In light of the date of the imposition of the sentences, the appellant would, on our finding, have already served his entire sentence and therefore ought to have been released forthwith. The fact that it took over three years for the Resident Magistrate's Court to produce the record in this matter, is highly lamentable. Methods should be immediately implemented to ensure that there is no repetition of such appalling delay.