Sweeney v O'Brien [2010] NTSC 18

PARTIES:	SWEENEY, TAYLIE JADE
	v
	O'BRIEN, JAMIE THOMAS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA AT DARWIN
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 4/10 (20926616)
DELIVERED:	4 May 2010
HEARING DATE:	23 April 2010 and 4 May 2010
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

CRIMINAL LAW – Appeal against sentence – stealing – unlawfully access data – obtain a benefit by deception – identity theft – whether the sentencing Magistrate erred – whether sentence is manifestly excessive – appeal allowed in part – appellant re-sentenced

Criminal Code s 210, s 227(1)(b), s 276B(1)(b), s 277
Oaths Act s 23F
Summary Offences Act s 68(1)

Clarke v The Queen [2009] NTCCA 5
Cranssen v The King (1936) 55 CLR 509

REPRESENTATION:

Counsel:

Appellant:	I Read
Respondent:	G McMaster

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	Sou1003
Number of pages:	36

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Sweeney v O'Brien [2010] NTSC 18
No. JA 4/10 (20926616)

BETWEEN:

TAYLIE JADE SWEENEY
Appellant

AND:

JAMIE THOMAS O'BRIEN
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 4 May 2010)

Introduction

[1] This is an appeal against sentence.

[2] On 7 December 2009, the appellant pleaded guilty to the following eight offences in the Court of Summary Jurisdiction at Darwin. First, contrary to s 68A(1) of the *Summary Offences Act*, on 14 April 2009 at Darwin, the appellant falsely and with knowledge of the falsity of the statement reported to Darwin Police Station that $35,350 was missing from her ANZ Bank account; and her report reasonably called for investigation by police. The maximum penalty for this offence is a fine of $500 or imprisonment for three months or both. Secondly, contrary to s 23F of the *Oaths Act*, on

17 April 2009 at Darwin, the appellant wilfully made a false statement in a Statutory Declaration while knowing the statement to be false. The maximum penalty for this offence is fine of $2000 or imprisonment for 12 months or both. Thirdly, contrary to s 210 of the *Criminal Code*, on 4 June 2009 at Darwin, the appellant stole a wallet and cash valued at $70 which was the property of Emily Adam. The maximum penalty for this offence is imprisonment for seven years. Fourthly, contrary to s 276B(1)(b) of the *Criminal Code*, on 4 June 2009 at Darwin, the appellant unlawfully accessed data held in a computer with the intent to gain a benefit for herself. The maximum penalty for this offence is imprisonment for 10 years. Fifthly, contrary to s 227(1)(b) of the *Criminal Code*, on 4 June 2009 at Darwin, the appellant by deception obtained $615 for herself from AMEX Money. The maximum penalty for this offence is imprisonment for seven years. Sixthly, contrary to s 227(1)(b) of the *Criminal Code*, on 31 July 2009 at Palmerston, the appellant by deception obtained $950 cash for herself. The maximum penalty for this offence is imprisonment for seven years. Seventhly, contrary to s 277 of the *Criminal Code*, on 4 August 2009 at Palmerston, the appellant attempted to steal $20. The maximum penalty for this offence is imprisonment for seven years. Eighthly, contrary to s 210 of the *Criminal Code*, between 15 July 2009 and 7 August 2009 at Darwin, the appellant stole a DVD of an electronic record of interview which was tendered as exhibit P2 in proceeding No 20820894. The maximum penalty for this offence is imprisonment for seven years.

[3] On 18 February 2010, the sentencing Magistrate imposed the following sentences on the appellant. For count 3, being the count of stealing the wallet and its contents, the appellant was sentenced to three months imprisonment commencing on 18 February 2010. For count 4, being the count of unlawfully accessing data held in a computer, the appellant was sentenced to 12 months imprisonment commencing on 18 February 2010. For count 5, being the count of obtaining $615 by deception, the appellant was sentenced to 12 months imprisonment commencing on 18 February 2010. For count 6, being the count of obtaining $950 by deception, the appellant was sentenced to 12 months imprisonment commencing on 18 February 2010. For count 1, being the count of making a false report to police, the appellant was sentenced to one month imprisonment cumulative on the sentence of imprisonment imposed for count 4. For count 2, being the offence of making the false statement in a statutory declaration, the appellant was sentenced to three months imprisonment cumulative upon the sentence imposed for count 4. For count 7, being the offence of attempting to steal $20, the appellant was sentenced to one month imprisonment cumulative upon the sentence of imprisonment imposed for count 2. For count 8, being the offence of stealing the DVD of the record of interview, the appellant was sentenced to three months imprisonment cumulative upon the sentence of imprisonment imposed for count 2.

[4] The total sentence imposed on the appellant was a sentence of 18 months imprisonment. The sentence of imprisonment was to be suspended after the

appellant had served eight weeks in prison. The sentence of imprisonment was suspended on the following conditions: for the entire operational period the appellant shall place herself under the supervision of a delegate of the Director of Correctional Services and she shall obey all reasonable directions about education, vocational training, employment, residence, associates and reporting; and the appellant shall undertake assessments, counselling and programs as directed by her probation and parole officer.

[5] Under s 40(6) of the Sentencing Act, the sentencing Magistrate fixed an operational period of two years.

[6] The appellant says the sentencing Magistrate erred in[1]:

(1) Failing to give adequate consideration to the personal circumstances of the appellant, in particular, her young age, antecedents and engagement with counselling.

(2) Rejecting a home detention order as an appropriate sentencing disposition on the grounds that: a home detention order would be too burdensome for the appellant's mother and, in many ways, is worse than prison.

(3) Rejecting a community work order as an appropriate sentencing disposition on the ground that it was better for the appellant to obtain employment than do community work.

[1] Grounds 4 to 9 inclusive correspond to additional grounds 1 to 6 which are referred to in the Appellant's Written Outline of Submissions.

(4) Finding, against the evidence, that, unlike illness, you do not need to treat disorders, you've got to live with them and do what you can.

(5) Finding, against the evidence, he was dealing with someone who was likely to be a very difficult case for her supervisor to manage.

(6) Finding, without evidence, that the victim ran a very good risk of having her credit worthiness or her credit rating interfered with.

(7) Finding on the basis of anecdotal and personal experience that identity fraud is increasing.

(8) Wrongly categorising the criminality as a breach of trust in circumstances where the appellant had no fiduciary relationship with her workmate.

(9) Wrongly categorising and elevating the objective seriousness of the offending.

(10) Imposing sentences that were manifestly excessive.

[7] On the morning of 4 May 2010, I allowed the appeal against the sentences imposed for counts 1, 2, 4, 5 and 6 and I set aside the sentences of imprisonment imposed by the Court of Summary Jurisdiction for those counts. Following are my reasons for decision.

The facts

[8] The appellant was born on 12 August 1988 in Leigh Creek, South Australia. She is 21 years of age. She was 20 years of age when she committed these offences. She and her family moved to the Northern Territory when she was four years of age. Her parents separated when she was six years of age and thereafter she was raised by her mother and stepfather. The appellant has a good relationship with both her mother and her stepfather.

[9] The appellant attended Woodroffe Primary School and Palmerston High School. She completed year 10 of high school and started year 11. After she left school, the appellant obtained an apprenticeship in hairdressing. She left this position when she fell pregnant some eight months later. After giving birth to her first child, the appellant obtained employment at a retail store as a sales representative on a casual basis. In August 2008, for about eleven months, she obtained employment as a court orderly working in the Local Court in Darwin. The appellant received $1300 net wages per fortnight as a court orderly. She has been unemployed since July 2009. She receives $800 per fortnight in Centrelink assistance.

[10] At the age of 16 years the appellant fell pregnant to her boyfriend of some three years. They separated after their daughter was born. The child is being raised by the appellant's mother and stepfather. The appellant does not contribute any money towards her own lodging or her daughter's needs.

[11] After she separated from the father of her child, the appellant formed a new relationship with another man and for a period of time she lived with him and his mother. She now resides with her mother and stepfather.

[12] The appellant has a prior criminal record. On 2 November 2006 she started an engine with alcohol in her blood with a reading of .074.

[13] The victim, Emily Adam, is also 21 years of age. She was a work colleague of the appellant. They shared the same office space. The appellant and the victim have a physical resemblance; both are slim, attractive Caucasian women with fair skin and long straight blond hair.

[14] On 14 April 2009, the appellant attended the Darwin Police Station on the corner of Mitchell Street and Knuckey Street. She falsely reported to police that $35,350 was missing from her ANZ Bank account. She made the false report to Constable Tomaszewsk, knowing it to be false. As a result of her complaint a PROMIS job was created and the job was assigned to the Northern Territory Police Fraud Unit for full investigation.

[15] On 17 April 2009, the appellant provided further details of her false complaint to the investigating police officers. She stated that on Thursday 9 April 2009 she withdrew $35,350 from an account in her own name with the Commonwealth Bank on Smith Street, Darwin. She then walked across the road to the ANZ Bank on Smith Street and deposited $32,350 into her ANZ Bank account for the purchase of a Toyota Hilux. The teller operator

wrongly handed her a receipt for only $35.35. She told the police she did not notice this discrepancy at the time.

[16] The appellant signed a statutory declaration about her complaint and she authorised the police investigating her complaint to have access to her Commonwealth Bank account. Enquiries conducted by the police at the Commonwealth Bank, confirmed the appellant did not have any active bank accounts with the Commonwealth Bank and the last account held by the appellant with that bank was closed in 2008. The Commonwealth Bank representative stated that if any person had withdrawn $35,000 from their account with the bank such a transaction would have been recorded on their system. The bank had no such record.

[17] Enquiries were also conducted at the ANZ Bank on Smith Street. CCTV footage for 9 April 2009 was seized and viewed by the police. The footage shows the appellant attended the ANZ Bank at around 3.20 pm and deposited a small amount of money. The transaction took no more than a couple of minutes. The CCTV footage was consistent with the bank's records which showed the appellant only deposited $35.35 with the bank on 9 April 2009. The investigating officer also spoke with the teller operator who served the appellant. The teller said the appellant only deposited $35.35 which was in a small envelope.

[18] On 27 April 2009, the police spoke to the appellant at her residential address and she signed an authority for police to access her Australian Central

Credit Union account to confirm her story. The police then made enquiries of the Australian Central Credit Union at Palmerston. The branch manager said the appellant had a current account with them. However, there were no records of a loan or an application for a loan. The appellant's credit union statements clearly show she did not have more than a couple of thousand dollars in her account at the time and she was not making any loan payments to the Australian Central Credit Union or any other financial institution.

[19] The appellant was notified by the police that their investigations revealed no evidence she was ever in possession of $35,000. The appellant agreed to attend at the offices of the fraud unit to speak to police about the inconsistencies in her complaint but she never attended. It is estimated there were 20 hours of investigation conducted by the police into the appellant's false complaint.

[20] On Thursday 4 June 2009, both the appellant and Emily Adam, the victim, were working at the Darwin Magistrates Court. While the victim was away from her desk, the appellant opened the victim's desk drawer and removed her wallet from her handbag. The wallet contained, among other things, the victim's driver's licence, ANZ visa debit card, other forms of personal identification and $20. The total value of the items stolen was $70.

[21] The appellant then logged on to a work computer and, using Emily Adam's password, she accessed a computer program called MyHR which is the

Government payroll system. She then printed out three of the victim's payslips.

[22] Later on 4 June 2009, the appellant attended at AMEX Money at 42 Edmund Street, Darwin. She impersonated Emily Adam and she approached one of the loans officers, Sarah Ruffley, and asked for a short term loan of $500. The appellant completed a loan application form using the victim's personal information and she forged the victim's signature at the bottom of the form. She did so with the intention of deceiving Ms Ruffley and obtaining a loan in the victim's name. The appellant presented the forged application to Ms Ruffley along with the victim's NT driver's licence, Medicare card, ANZ visa debit card, MBF health card and the three pay slips she had printed out. Before leaving the office of AMEX Money, the appellant gave the loans officer a mobile telephone number and asked that she only be contacted on that number.

[23] That afternoon, the loans officer of AMEX Money reviewed the loan application and conducted a credit check on Emily Adam. Deceived into believing the appellant was Emily Adam, she approved the short term personal loan for $615 and contacted the appellant on the mobile telephone number the appellant had provided and told her the loan had been approved.

[24] The same afternoon the appellant returned to the office of AMEX Money. She again impersonated Emily Adam and forged the victim's signature on the loan contract. The loans officer asked the appellant to give her access to

a bank account from which funds could be direct debited if the appellant defaulted on the loan payments and the appellant filled out a direct debit request form using the victim's active ANZ Bank account details. The appellant forged the victim's signature at the bottom of the form authorising AMEX Money to withdraw money from the victim's account in which her fortnightly pay was deposited. The appellant was given $500.15 and she walked out of the office with the cash. She was not entitled to take the cash.

[25] On 10 June 2009, Emily Adam began receiving correspondence advising her that a loan with AMEX Money was overdue. The victim, having no knowledge, of the loan dismissed the advice as a mistake. She showed the letter to the appellant who lied to her. The appellant told the victim she knew someone at AMEX Money who would resolve the issue for her. She later told the victim that AMEX Money had made a mistake and a letter was in the mail. The victim was satisfied with what the appellant had told her and took no further action.

[26] The loan taken out in the name of Emily Adam remained in default and was accumulating fees and interest. As a result, on 30 June 2009, $436 was withdrawn from the victim's ANZ Bank account by AMEX Money and on 28 July 2009, a further amount of $220.75 was with drawn by AMEX Money. Both withdrawals were made without the knowledge or consent of the victim. The two withdrawals were used to pay out the loan in the victim's name and the account settled.

[27] On 29 July 2009, Emily Adam's wallet and a piece of paper with her user ID and password to her computer were found in the bottom drawer of the appellant's desk by a co-worker at the Local Court in Darwin. The wallet did not contain the victim's ANZ visa debit card.

[28] On 31 July 2009, the appellant attended the ANZ Bank on the corner of The Boulevard and Palmerston Circuit in Palmerston. She impersonated Emily Adam with the intention of deceiving the teller operator and stealing money from the victim's bank account. The appellant approached the teller operator, Michelle Robbins, claiming she was having trouble withdrawing money from the ATM with her ANZ visa card. She handed the teller operator the stolen ANZ visa card and correctly answered questions about the victim's date of birth. Ms Robbins was deceived into believing the appellant was the victim. She completed a request to withdraw $950 from Emily Adam's account and handed the appellant $950. Ms Robbins also gave the appellant an emergency access card with an attached PIN as a temporary measure to access the victim's ANZ Bank account. The appellant left the ANZ Bank with the victim's $950 and the emergency access card knowing she was not entitled to them.

[29] On 4 August 2009, the appellant went to the ATM outside the ANZ Bank at Palmerston with the intention of withdrawing $20 from the account of Emily Adam which she was not authorised to do. The appellant placed the emergency access card belonging to the victim into the ATM and entered the PIN. She then attempted to withdraw $20 from the victim's account. The

card, however, had been recorded as being stolen and the ATM retrieved the card. The appellant left the area.

[30] On Friday 7 August 2009, the police searched the appellant's residence. During the search the police found a DVD in the appellant's handbag in the bedroom she shared with her partner. The DVD was an exhibit in a criminal proceeding in the Court of Summary Jurisdiction. It contained a record of interview with the accused in proceeding No 20820894 in the Court of Summary Jurisdiction.

[31] On 15 July 2009, the appellant was court orderly for a hearing in the matter of *Police v Kyle Hansen-Detaurbet* in Court 2 of the Court of Summary Jurisdiction. In the course of the hearing the Police Prosecutor tendered a DVD containing a record interview. The exhibit was handed to the appellant and labelled exhibit P2. The appellant was trusted with these exhibits and she was required to secure them in the exhibits room of the court. The appellant, however, kept the exhibit in her possession and took it home with her in her handbag.

[32] The following morning, the hearing in Court 2 continued and it was noted that exhibit P2 was missing. Mr Dane Myers, Acting Manager of Court Orderlies, told the appellant the exhibit was missing. The appellant told him she did not know where the exhibit was.

[33] On Monday 10 August 2009, the appellant attended the Peter Macaulay Centre at Berrimah and voluntarily participated in a recorded interview with

police. During the interview the appellant made no admissions to any of the offences. She gave no explanation as to why the victim's wallet and passwords were located in her desk drawer and she made no admissions to impersonating Emily Adam or taking out a loan in her name. The appellant acknowledged that it was her who had been captured on the CCTV footage at the ANZ Bank in Palmerston. However, she declined to say why she was there. The appellant did not offer any explanation as to how the exhibit ended up in her handbag at her home.

[34] The appellant did not have permission from Emily Adam to take out a loan using her identity or take money from her ANZ Bank account. As a result of the offending the victim had $1,606.75 removed from her bank account without her consent. The appellant received $1,470.75 by deception. The appellant did not have permission to remove any exhibits from the Local Court building.

[35] A victim impact statement of Emily Adam was tendered in evidence. Emily Adam stated as follows. She considered the appellant to be one of her closest friends. She was a work colleague as well as a friend. When she first noticed her wallet was missing, the appellant was the first person to offer to help her look for it. When she started receiving default letters about the loan the appellant offered to help her sort it out. She now realises this was all part of the appellant's deceptive behaviour. When she first became aware the appellant had stolen her identity she was shocked. She could not believe the appellant had kept her wallet just two metres away from her desk

for almost two months. This realisation was devastating. She no longer feels she can trust anyone in her work place. She has trouble making new friends. She feels they will betray her and hurt her. She has trouble getting up in the morning and going to work. She feels a complete fool and she is ashamed and embarrassed. She has become quite depressed. She is constantly anxious, stressed and upset. She has had to take time off work. She has not been able to cope emotionally and mentally with what has happened to her.

[36] By way of explanation for making the false complaint to police and making a false statutory declaration, the appellant told the probation and parole officer who prepared her pre-sentence report for the Court of Summary Jurisdiction that, at the time of the offending, she was living with her partner and his mother. Her partner wanted the appellant to purchase his Commodore for $30,000 so he could buy a second hand Hilux Utility which he urgently needed for his work. The appellant said she felt pressure from her partner so she made an application for a loan which was unsuccessful. However, she lied to her partner. She falsely told him the loan had been approved. The appellant thought she would be able to successfully apply for a loan elsewhere.

[37] The appellant told her probation and parole officer that as time went on she continued to be pressed by her partner and his mother about the loan money. In order to buy time, she told them the loan money had gone missing. She lied to buy time. However, her partner's mother urged her to report the

matter to the police. As a result of these urgings she made the false complaint and the false statutory declaration.

[38] The appellant said she committed the dishonesty offences involving her friend, Emily Adam's identity and bank account because her partner and his mother were in financial difficulty and they pressed her to help out with their mounting expenses. She had obtained a loan from AMEX Money in the past, but she was ineligible to obtain further finance from them. As a result she used the victim's identity to obtain further finance.

[39] The appellant told her probation and parole officer that she stole the DVD of the record of interview because the accused was someone she knew and she was curious to see and hear what was said to police. Initially she had intended to return the DVD.

[40] Before she was sentenced in the Court of Summary Jurisdiction the appellant started undergoing counselling at Amity Community Services Inc. She had attended eight counselling sessions and missed four counselling sessions. The counselling sessions involved motivational interviewing, adult learning principles and cognitive behavioural therapies. She had also seen Dr McLaren who is a psychiatrist.

[41] The pre-sentence report states that Dr McLaren confirmed he met the appellant on two occasions. At the first appointment the appellant neglected to tell him about her matters which were before the Court of Summary Jurisdiction. Dr McLaren suggested that the appellant should contact the

Employee Assistance Service for assistance about her lying. Dr McLaren said the appellant's mother dragged the appellant to the second appointment he had with her. He said the appellant was a selective liar and noted it was "second nature" to her. Such a condition was a personality disorder not a mental health issue. Dr McLaren was of the opinion that, unless there was a powerful reason not to, the appellant would continue to tell lies. He thought long term supervision would assist the appellant and a short term of imprisonment could be of benefit.

[42] The pre-sentence report also states that the appellant's mother reported to the probation and parole officer who prepared the pre-sentence report that she had taken all responsibility for the care of the appellant's child. The appellant did not contribute any money towards lodging or towards her daughter's needs. The appellant's mother also stated the appellant had been lying and stealing for such a long time they had come to expect it of her. She and her partner put a coded lock on their bedroom door about five years ago to stop the appellant taking money and other items.

[43] Prior to being sentenced the appellant wrote a considered letter of apology to Emily Adam.

The remarks of the sentencing Magistrate

[44] In his remarks, the sentencing Magistrate divided up the whole of the appellant's offending into three episodes of offending. The first episode of offending involved the making of the false complaint to police and the false

statutory declaration. The second episode of offending involved the taking of Emily Adam's wallet and its contents and the obtaining of money by deception. The third episode of offending involved the theft of the DVD containing the record of interview.

[45] The sentencing Magistrate considered the obtaining of money by deception to be the most serious offending. As to the objective seriousness of this offending he noted the following. Only a relatively small amount of money was involved. The offending involved a breach of trust of a kind. The breach of trust was not of a special category but employees do rely on the honesty of their co-workers. There was a significant intrusion into Emily Adam's privacy and the use of her identity. The appellant used the information which she got from the cards and notes in Emily Adam's wallet to go into her MyHR account and obtain copies of her payslips and she used the information and Emily Adam's identity to set up a fraudulent loan. The fraudulent loan was set up so repayments were to come out of Emily Adam's bank account. Emily Adam suffered emotionally as a result of the appellant's criminal conduct. The appellant had a number of opportunities to come clean but she told more lies to cover up the situation and this allowed the amount money that was owed and was removed from Emily Adam's bank account to become greater. The offending was significantly worse than opportunistic offending. It was a do it yourself scam. It was not a matter of need over greed.

[46] By way of mitigation, the sentencing Magistrate noted that the appellant's pleas of guilty were early pleas of guilty. The appellant had only one prior offence which was not relevant to this offending and apart from that offending she had not been in trouble with the courts. She wrote a letter of apology to Emily Adam. She had got herself into a rut and she felt she could not get out of it.

[47] As to the appellant's subjective circumstances, the sentencing Magistrate noted the appellant was a young single mother whose child was being brought up by her mother. He noted she was unemployed. The appellant was a compulsive and selective liar who had caused considerable difficulty for her mother. The appellant suffered from a personality disorder not a mental illness.

[48] As to the available sentencing dispositions, the sentencing Magistrate concluded that he could not find his way clear to do anything else other than impose sentences of imprisonment. He was also of the opinion that the appellant would take a bit longer than usual to work out that if she told lies to get out of trouble she may have a term of imprisonment ahead of her. In effect he concluded that the sentencing purpose of specific deterrence required that the appellant be sentenced to a short term of imprisonment.

Ground one

[49] Counsel for the appellant, Mr Read, submitted that the sentencing Magistrate gave scant regard to the general subjective considerations of the

appellant. Of significance, Mr Read stated, the appellant was a single mother at a young age. After the relationship with the father of her child ended she formed another relationship and moved in with her partner and his mother. It would appear she sought to contribute and foolishly offered to help her partner out by obtaining a loan to purchase his car so he could purchase another motor vehicle. Having not been able to obtain a loan for the car, it would appear she tried dishonestly to maintain face. No acknowledgment was made of what ordinarily would be regarded as the struggles of a young mother, her work and training record and her efforts to address her need for change and positive steps toward rehabilitation. Pleas of guilty were indicated and a thoughtful letter of apology was tendered in evidence. The pre-sentence report was indicative of a frank acknowledgment of her offending, the genesis of such behaviour, and the steps taken to address her behaviour and suitability for supervision.

[50] In my opinion this ground of appeal is not made out. The argument is somewhat misconceived. The argument is really an argument that the sentencing Magistrate did not give sufficient weight to the appellant's remorse and prospects of rehabilitation. Mr Read was, in effect, arguing that the appellant is genuinely remorseful and she has developed some insight into the cause of her offending. She has sought out and is undergoing therapy in order to try and change her entrenched patterns of dishonest behaviour.

[51] It is apparent from the fact that the sentencing Magistrate ordered a pre-sentence report before sentencing the appellant that he did have full regard to her subjective circumstances, to her level of remorse and to her prospects of rehabilitation. The sentencing Magistrate essentially determined that the objective seriousness of the appellant's offending and level of moral culpability were such that he had no option other than to impose sentences of imprisonment. He also took the view that because the appellant was a person who had behaved dishonestly for a long period of time her rehabilitation would be a drawn out process and it was necessary to give some weight to specific deterrence in the sentencing process. The sentencing Magistrate's view about how difficult the appellant's rehabilitation would be is supported by the remarks of Dr McLaren and the comments of the appellant's mother about the appellant's behaviour which are referred to in the pre-sentencing report. The sentencing Magistrate's view is also supported by the lies the appellant told to cover up her offending.

[52] The sentencing Magistrate suspended 16 months of the total sentence of imprisonment he imposed on the appellant, and he ordered she be supervised for a period of two years and her supervision include assessments, counselling and rehabilitation programs as determined by the appellant's probation and parole officer.

Ground two

[53] In support of this ground of appeal, Mr Read submitted that a home detention assessment was obtained, the appellant was found to be suitable for home detention and there was no evidence to suggest home detention was a risk because her mother would be burdened by having the appellant reside with her and her partner. Further, there was no evidence to suggest the appellant was a person who regularly hacked into computers. The facts were she unlawfully used a computer on one specific occasion.

[54] In my opinion, there is some force in Mr Read's submissions. The matters pleaded in this ground of appeal[2] are irrelevant considerations in sentencing the appellant. There was no evidence on which the remarks of the sentencing Magistrate could be based. The matters pleaded in this ground of appeal are not appropriate grounds for dismissing home detention as a possible sentencing disposition. However, it is apparent from a fair reading of the whole of the sentencing Magistrate's remarks that the reason he excluded home detention as a sentencing disposition was because of what he considered to be the objective seriousness of the offending, the weight he gave to deterrence and he considered the appellant's prospects of rehabilitation to be problematic.

[55] While the error is established, this ground of appeal cannot be sustained. A sentence of imprisonment was an appropriate sentencing disposition for all counts except counts 1 and 2.

[2] See par [6] above.

Ground three

[56] As to ground three, Mr Read argued that the appellant was assessed as suitable for community work. A suitable project was available. The prospects of the appellant immediately obtaining employment were not good and the appellant needed to address her personal issues before she sought employment. In the circumstances, the need for the appellant to otherwise obtain employment was an irrelevant consideration.

[57] I accept Mr Read's submission that the need for the appellant to obtain employment was an irrelevant consideration. However, it is apparent from a fair reading of the whole of the sentencing Magistrate's remarks that this was not the only reason the sentencing Magistrate excluded a community work order as a sentencing disposition. He also considered the objective seriousness of the appellant's offending, the weight to be given to deterrence and the problematic nature of the appellant's prospects of rehabilitation.

[58] While the error is established and is a basis for allowing the appeal in respect of the sentences imposed for counts 1 and 2, this ground of appeal cannot be sustained in relation to counts 3 to 8 inclusive.

Ground four

[59] As to ground four, Mr Read submitted that the sentencing Magistrate made the finding that, "Unlike illnesses you do not treat disorders, you've got to live with them, you do what you can", in circumstances where the pre-

sentence report plainly referred to steps being taken by the appellant to overcome her behavioural problems. The finding was against the weight of the evidence.

[60] While the remarks of the sentencing Magistrate were not completely accurate, there was some evidence before the Court of Summary Jurisdiction upon which such remarks could be based. The pre-sentence report stated that Dr McLaren, a psychiatrist, had reported to the author of the pre-sentence report that the appellant had a personality disorder and not a mental health condition. Dr McLaren was of the opinion that the appellant would continue to lie unless there was a powerful reason not to and he thought long term supervision would assist the appellant and a short term of imprisonment would be of benefit.

[61] There was also evidence in the pre-sentence report which had been obtained from the appellant's counsellor at Amity Community Services Inc. The counsellor reported utilising a Cognitive Behavioural Therapy approach and had been working with the appellant on her negative core beliefs. The counsellor reported the appellant was participating and engaging well. However, the counsellor did not report that the appellant's rehabilitation was complete or that her rate of progress was such that it was unlikely the appellant would re-offend.

[62] The overall effect of the whole of the evidence before the Court of Summary Jurisdiction was that while the appellant did not have a mental illness there

were certain therapies or programs that may assist the appellant to change her entrenched patterns of behaviour. She had sufficient insight to engage in such a program which indicated a desire to change her behaviour. However, any process of rehabilitation was likely to be difficult and protracted and there was still a risk the appellant may re-offend.

[63] The critical question for the sentencing Magistrate was whether the appellant's prospects of being rehabilitated were such as to displace all of the weight which should otherwise be given to deterrence. Ultimately he decided they were not. However, his ultimate decision was not a decision which ignored the fact there were programs which would assist the appellant to change her behaviour. The appellant's sentence of imprisonment was suspended after eight weeks on the condition her supervision include assessments, counselling and rehabilitation programs as determined by her probation and parole officer.

[64] While the error is established, the ground of appeal is not made out.

Ground five

[65] As to ground five, Mr Read argued there was no basis for the sentencing Magistrate finding that, "I know I'm dealing with someone who's likely to be a very difficult case for the supervisors", other than the appellant has had trouble with the truth over the years which was brought to light by a perceptive, frank and responsible mother. Since her offending the appellant

had cooperated with her counsellors at Amity Community Services Inc and she was voluntarily endeavouring to change her behaviour.

[66] In my opinion this ground of appeal has no merit. The following information was before the Court of Summary Jurisdiction: the admitted facts of the offending; the appellant's mother's statements in the pre-sentence report that the appellant had been lying and stealing for such a long time that they had come to expect this of her; despite being a supportive parent, she had put a coded lock on her bedroom door; the appellant's statement that she lies to avoid consequences; the appellant's mother's statement that this pattern of behaviour has been long standing; Dr McLaren's statement that the appellant failed to tell him about her offences; Dr McLaren's statement that the appellant was a selective liar, it was second nature to her; Dr McLaren's statement that the appellant will continue to lie unless she has a powerful reason not to and a short term of imprisonment would be of benefit; and the statement of the probation and parole officer that the appellant presents with an entrenched pattern of anti-social behaviour which has gone unchecked for sometime and is escalating. The information provides a basis upon which the sentencing Magistrate could have concluded the appellant was likely to be a very difficult case for the supervisors. She had, after all, been a difficult child for her mother to supervise.

[67] To make such a finding is not the same as making a finding that the appellant should not be supervised.

Ground six

[68] As to this ground, Mr Read submitted that there was no evidence for the sentencing Magistrate to base his findings, "that the victim ran a very good risk of having her credit worthiness or credit rating, interfered with".

[69] I accept Mr Read's submission. There was no evidence that Emily Adam's credit rating had been adversely affected as a result of the appellant's criminal conduct. The statement in Ms Adam's victim impact statement that, "at this point in time I still do not know if what Taylie has done will affect my credit history in the future", is not evidence that her credit rating has been adversely affected. The sentencing Magistrate's error in this regard had the effect of increasing the objective serious of counts 5 and 6.

[70] This ground of appeal is made out.

Ground seven

[71] Mr Read submitted that the sentencing Magistrate erred in finding on the basis of anecdotal and personal experience that identity fraud is increasing.

[72] I accept this submission. There was simply no evidence of prevalence before the sentencing Magistrate and this was the first matter of such a nature that had come before him. The sentencing Magistrate's error in this regard had the effect of increasing the objective serious of counts 4, 5 and 6.

Ground eight

[73] Mr Read submitted that, despite some concession by the appellant's counsel, the sentencing Magistrate erred in wrongly characterising the criminality as to counts 3 to 7 inclusive as a breach of trust in circumstances where there was no fiduciary relationship between the appellant and Emily Adam. In so doing, the sentencing Magistrate wrongly elevated the objective seriousness of the criminality.

[74] In my opinion this ground of appeal is not made out. Counsel for the appellant at first instance conceded there was breach of trust between friends. The learned sentencing magistrate noted that the appellant's offending which constituted counts 3, 5, 6 and 7 was not the same as a servant stealing from an employer and he qualified what he meant when he said there had been a breach of trust. He said:

> The criminal law has never had a special category of theft from a fellow worker but anyone who works for a living knows how important that trust is. We are frequently in a position where we have to leave our valuables behind and we are frequently in a position where we cannot deny other people access to where they are.
>
> In this building, for example, a magistrate might be able to lock his wine in his cupboard or his art collection, whatever he keeps in his chambers when he goes to work. The court-staff are in an open space office; all sorts of people have access and at best they can lock things up in a desk drawer. They rely on the honesty of their workmates.

[75] The matters referred to are relevant circumstances of the offending and go to the moral culpability of the appellant. These matters are also relevant to the sentencing purpose of deterrence.

[76] There was, in fact, a breach of trust in relation to the theft of the DVD which contained the record of interview. It was a crime of theft by an employee from an employer.

Ground nine

[77] Mr Read submitted that the sentencing Magistrate erred in wrongly categorising and elevating the objective seriousness of the offending. He argued that the objective seriousness of the offending was elevated upon wrong premises of prevalence, breach of trust and the affect upon the victim, be it damage to her credit rating or the relative hardship suffered by a less well healed victim.

[78] This ground of appeal is a summary of grounds 6, 7 and 8. I accept that the objective seriousness of counts 4, 5 and 6 was wrongly elevated as a result of the sentencing Magistrates findings about prevalence and of potential harm to the victim's credit rating. For the reasons set out in pars [73] to [76] above, I do not accept Mr Read's argument about breach of trust. Nor has it been established that the sentencing Magistrate elevated the objective seriousness of the appellant's offending as a result of findings about the relative hardship suffered by Emily Adam.

[79] This ground of appeal is made out in part.

Ground ten

[80] Mr Read argued that in all of the circumstances the sentences imposed on the appellant were manifestly excessive. In this regard he relied on *Cranssen v The King*[3]. In *Clarke v The Queen*[4] Riley J described the relevant principles as follows:

> The principles applicable to this ground are well known. It is fundamental that the exercise of the sentencing discretion is not to be disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error. An appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceeding or the sentence itself may be so excessive as to manifest error. In relying upon this ground it is incumbent upon the appellant to show that the sentence was not just excessive, but manifestly so. The appellant must show that the sentence was clearly and obviously, and not just arguably, excessive.

[81] This ground of appeal should succeed in part. In my opinion the sentences imposed for counts 1 and 2 were manifestly excessive, as were the sentences of imprisonment imposed for counts 4, 5 and 6.

[82] As to counts 1 and 2, the sentences themselves are so excessive as to manifest error. A sentence of imprisonment for those counts is unreasonably disproportionate to the objective seriousness of the offences and the circumstances in which the offences were committed. For the reasons referred to in par [56] and [58] above, the sentencing magistrate also erred in dismissing a community work order as an appropriate sentencing

[3] (1936) 55 CLR 509.
[4] [2009] NTCCA 5 at par [42].

disposition for counts 1 and 2. A sentence of imprisonment for those offences does not give due weight to the relatively young age of the appellant or to the fact that these offences were the first two offences of dishonesty that she committed.

[83] Likewise, as to counts 4, 5 and 6 the sentences themselves are so excessive as to manifest error. The length of each of these sentences of imprisonment is unreasonably disproportionate to the objective seriousness of the offences. The sentencing magistrate also erred in finding that such crimes were prevalent and by finding that the victim's credit rating may have been affected by the criminal conduct of the appellant. During the course of submissions before this Court, Mr Read handed up a summary containing comparative sentences for crimes of dishonesty. The sentences of imprisonment imposed on the appellant for counts 4, 5 and 6 were well outside the range of sentences imposed for comparable offences by the Court of Summary Jurisdiction.

[84] In my opinion, the sentences imposed for counts 3, 7 and 8 are not so excessive as to manifest error. Nor has any error been demonstrated in respect of those sentences.

[85] I confirm the sentences of imprisonment imposed by the Court of Summary Jurisdiction for counts 3, 7 and 8.

Re-sentencing

[86] As to counts 1 and 2, being the counts of making a false complaint to police and the count of making a false statutory declaration, I convict the appellant and I sentence the appellant to an aggregate sentence of 20 hours community work. The community work is to be completed by the appellant within three months of the appellant being released from prison.

[87] As to counts 4, 5 and 6, being the one count of unlawfully access data from a computer and the two counts of unlawfully obtain a benefit by deception, I sentence the appellant to an aggregate sentence of seven months imprisonment. It is appropriate to impose an aggregate sentence of imprisonment because the appellant engaged in a single course of conduct. The sentence of imprisonment is to be served concurrently with the sentence of three months imprisonment that the Court of Summary Jurisdiction imposed for count 3. Likewise, the sentence of one month imprisonment that the Court of Summary Jurisdiction imposed for count 7 is to be served concurrently with the aggregate sentence of seven months imprisonment that I have imposed for counts 4, 5 and 6. That gives an aggregate sentence of imprisonment thus far of seven months. The sentence of three months imprisonment that the Court of Summary Jurisdiction imposed for count 8 is to be served cumulatively on the sentence of seven months imprisonment that I imposed on the appellant for counts 4, 5 and 6. That gives a total sentence of 10 months imprisonment. The sentence of 10 months imprisonment is to start when the appellant hands herself into custody in

accordance with the recognizance she executed in the Court of Summary Jurisdiction.

[88] The sentence of 10 months imprisonment is be suspended after the appellant has served 14 days in prison. The sentence of imprisonment is suspended on the following conditions:

(1) For a period of nine months and 14 days following her release from prison, the appellant is to be under the supervision of the Director of Correctional Services or his delegate and she is to obey all reasonable directions as to residence, reporting, training and employment.

(2) For a period of nine months and 14 days following her release from prison, the appellant is to undertake assessments, counselling and rehabilitation programs as directed by her probation and parole officer.

[89] Under s 40(6) of the *Sentencing Act*, I specify the appellant is not to commit another offence punishable by a term of imprisonment for a period of two years following her release from prison. But for the appellant's pleas of guilty, I would have imposed an aggregate sentence of nine months imprisonment on the appellant for counts 4, 5 and 6.

[90] I order that the appellant is to make restitution to AMEX Money and to the ANZ Bank. Restitution is to be made within 12 months of the appellant's release from prison.

[91] As to the objective seriousness of counts 4, 5 and 6, I have had regard to the following matters. The offending involved a high level of moral culpability. The appellant stole a significant amount of money from a close friend and work colleague. The offending was premeditated and involved some planning. The appellant accessed the victim's computer and obtained copies of three of her payslips. She then passed herself off as the victim in order to obtain a loan of $500 and a withdrawal of $950 cash. She did so with the use of the victim's personal information. She arranged the loan so that loan repayments were to be made out of the victim's account. During the course of her offending she lied to the victim in order to hide her offending. The appellant engaged in the offending over a period of two months and she did not stop her offending until she was apprehended by police. The appellant's offending escalated during the course of her criminal conduct. Emily Adam was emotionally traumatised by the appellant's criminal conduct. The objective seriousness of the appellant's offending is qualified by the fact that comparatively speaking the amount of money stolen by the appellant was not a large amount of money and she only accessed the victim's computer once.

[92] As to the appellant's subjective circumstances, I have had regard to her relatively young age and to her reasonable employment record. I have also

had regard to the fact the pre-sentence report reveals her to be a selfish person who is a compulsive liar. She is so despite the fact that she has been raised by a caring and well meaning mother and step-father. I have also had regard to the fact that the appellant is seven months pregnant with her second child. I note the appellant has taken no responsibility and has shown little interest in the raising of her first child. Her mother has been responsible for the raising of her first child.

[93] By way of mitigation, I have taken into account the appellant's pleas of guilty, her expressions of remorse, her preparedness to make arrangements so that restitution may be made to the financial institutions from whom she fraudulently obtained money, and the fact she has voluntarily undertaken counselling in order to try and change her behaviour. The latest report from Amity Community Services Inc reveals that between 12 October 2009 and 21 April 2010 the appellant attended eleven counselling sessions at Amity Services Inc and she missed six counselling sessions. Her counsellor states the appellant has demonstrated increased insight into how her unhelpful behaviour negatively impacts upon herself and others. Her counsellor previously reported that the appellant was participating and engaging well in her counselling sessions.

[94] In my opinion, given the extended period over which the appellant has been engaging in anti-social behaviour and the limited period of time over which the appellant has been engaging in counselling, the prospect of her rehabilitation still remains problematic. However, she is by no means

without hope. The appellant now has some insight into her anti-social behaviour and she has started to take responsibility for her anti-social behaviour and her offending.

[95] In sentencing the appellant for counts 4, 5 and 6 and in structuring the total sentence of imprisonment that I have imposed on the appellant, I have given considerable weight to punishment and specific and general deterrence. Employees are vulnerable to having their private information on their computers accessed by fellow employees and identity theft enables appellants to obtain access much larger sums of money than would otherwise be the case. Such crimes are frequently difficult to detect. Further, the theft of the court exhibit by the appellant was a serious breach of trust by an employee which had the potential to seriously interfere with the administration of justice. The safe storage of exhibits is an onerous and important responsibility which is imposed on court officers. The courts must do what they can to protect the public from such crimes as were committed by the appellant. The community strongly disapproves of such crimes.

[96] I have also given some weight to the appellant's prospects of rehabilitation.

[97] In my opinion, for the above reasons, the only appropriate sentencing disposition is a sentence which requires the appellant to spend some time in prison.
