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JERU DIN

v.

REGINAM

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[SUPREME COURT, 1972 (Grant J.), 23rd, 29th November]

Appellate Jurisdiction

Criminal law—sentence—fraudulent application of money by a public servant—special position of trust outweighing personal considerations—appellate court's function in relation to sentence based on grounds of injustice, not mercy—Penal Code (Cap. 11) ss.306, 306(b) (ii), 306(c) (ii)—Criminal Procedure Code (Cap. 14) ss.80(2), 123(a) (ii), 123(a) (iii), 123(j), 197(1).

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In considering an appeal against sentence for fraudulent application of money (a sum amounting to $591.82) by a public servant the court indicated that employment in the public service creates a special position of trust which, in the circumstances of the case, outweighed personal consequences.

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It is not the function of an appellate court to interfere with a sentence on the grounds of "mercy" but only if the sentence is unjust.

Cases referred to:

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R. v. Smith [1963] Crim. L.R. 526.

R. v. Bicknell and Graham [1966] Crim. L.R. 171.

R. v. de Haan [1967] 3 All E.R. 618.

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Appeal to the Supreme Court against a sentence imposed by a magistrate for fraudulent application of money by a public servant.

G. P. Lala for the appellant.

R. Davies for the respondent.

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29th November 1972

GRANT J.:

On the 3rd day of October, 1972 the appellant who is aged thirty eight and who has been in Government service for fourteen years was convicted on his own plea of Fraudulent Application Of Money By A Public Servant contrary to Section 306 of the Penal Code, and was sentenced to eighteen months' imprisonment against which sentence he has appealed on the grounds that it is wrong in principle, too harsh and manifestly excessive.

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A The particulars of the offence are that the appellant between the 16th December, 1971 and the 20th January, 1972 at Suva in the Central Divisional, being employed in the public service of Her Majesty fraudulently applied or disposed of, for purposes other than for the public service, a sum of money namely $591.82 received by him by virtue of his employment; Section 123(j) of the Criminal Procedure Code permitting of the particulars to be so framed.

B In the Statement of Offence the offence in question has been correctly described and the section creating the offence, namely Section 306 of the Penal Code, has been correctly included in accordance with the provisions of Section 123(a) (ii) of the Criminal Procedure Code, and thereafter the Particulars of Offence have been properly set out in accordance with the provisions of Section 123(a)(iii) of the Criminal Procedure Code. However, although the point was not taken, I have C noted that in the Statement of Offence an incorrect subsection of Section 306 has been added, namely subsection (c) (ii), in error for subsection (b) (ii); and I have seriously considered whether this is a fatal defect. I have come to the conclusion that the inclusion in the Statement of Offence of a subsection was, in respect of an offence of this particular type, unnecessary in view of the provisions of the Criminal Procedure Code to which I have already referred and, bearing in mind Sections D 80(2) and 197(1) of the Criminal Procedure Code, that the error is not fatal. The accused was legally represented on his trial, and it is clear from the record that the substance of the charge was stated to the accused and the facts relating to the offence of fraudulent application of money by a public servant properly outlined and admitted by him. Consequently no question of his being misled or deceived arises, nor has it even been suggested, and there is no reason for this Court to E interfere. However so as to avoid any misunderstanding arising at a later stage I think it desirable that the warrant of commitment and the police record of convictions should omit the superfluous reference to the incorrect subsection.

I might add that had it been the wrong section that was quoted or F had there been any possibility of the accused being misled or deceived, the outcome may well have been different; and that this is yet another instance which demonstrates the need for greater care to be exercised by those responsible for the preparation of charges and for the Magistrates to pay closer regard to their duty of ensuring that charges preferred against accused persons in their Courts are properly framed.

G On the hearing of the appeal against sentence counsel for the appellant submitted that no immediate custodial sentence was necessary on the following grounds :

(1) that the consequences which flow from the appellant's conviction, namely his loss of pension and unlikelihood of ever again H being employed in a position of trust, are punishment enough;

(2) that this is not a very prevalent type of offence;

(3) that it is a case that calls for mercy; and

(4) that the appellant's plea of guilty should have been taken into account.

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In regard to the first ground, the appellant was employed in the public service and as such was in a special position of trust. In these circumstances the breach of trust outweighs personal consequences. To cite but three examples out of many, in *R. v. Smith* (1963] Crim. L.R. 526, a railway checker aged fifty six with no prevous convictions and forty one years' public service pleaded guilty to receiving property worth £24 stolen from the railway and the English Court of Criminal Appeal upheld the sentence of fifteen months' imprisonment despite the fact that, as they stated, "one cannot help being sorry for a man of fifty six who has thrown away a previous good character after forty one years with the railway and will no doubt lose his pension." In *Bicknell and Graham* [1966] Crim. L.R. 171, two gas board employees were sentenced to two years after admitting stealing over seventy hot water coils from their employer. The English Court of Criminal Appeal accepted that the offences were not commitited for profit and stated that "these cases are tragic cases when public servants . . . throw away their jobs and their pension rights at the end of a long period of service. The Court has given this matter very anxious consideration. The fact remains . . . that this sort of behaviour, servants helping themselves at the expense of their employers, is only too rife today, particularly in what one might call the public service, therefore any sentence here has got to mark the gravity of the offence"; and the sentence was upheld. Only this month a Fiji civil servant in his thirties, holding the post of assistant postal officer, being convicted on his own plea of an isolated offence of larceny by servant involving $4,000 was sentenced by the Chief Justice to three years' imprisonment (Rotuma Criminal Case No. 55/72).

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In regard to the second ground, no statistics were quoted in support, but this Court is aware of a number of cases of this type, that is to say misappropriation of funds by Government servants, and has no doubt that deterrent sentences are called for.

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With regard to the third ground, it is not the function of an appellate court to interfere on the grounds of "mercy" but only if the sentence is unjust. As Lord Devlin has said "Justice and mercy are qualities which overlap but which are nevertheless distinct. The just sentence is the one that is adjusted to the crime itself; there can be no exact measure, but there are limits outside which a sentence is not just . . . When the Court of Criminal Appeal alters a sentence on the grounds that it is excessive, it does not do it on the grounds that the judge was unmerciful, but that he has erred in principle, that is, has been unjust." (Vide [1954] Crim. L.R. 661 at 664 and 665). It should also be remembered, as George Eliot has so aptly written, that "there is a mercy which is weakness, and even treason against the common good."

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With regard to the fourth ground, the fact that a plea of guilty indicates repentance and should be taken into account in mitigation of sentence is well established. To quote the English Court of Criminal Appeal in *R. v. de Haan* [1967] 3 All E.R. 618 at 619, "It is undoubtedly right that a confession of guilt should tell in favour of an accused person, for that

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is clearly in the public interest." However I have no reason to doubt
A that this factor was taken fully into account by the trial Magstrate when imposing sentence.

The sentence imposed is neither wrong in prnciple nor manifestly harsh and excessive and the appeal is accordingly dsmissed.

Appeal dismissed.