STATE v RAYMOND ROBERTS (HAA0053 of 2003S)

HIGH COURT — APPELLATE JURISDICTION

SHAMEEM J

23, 30 January 2004

Criminal law — sentencing — larceny by servant — custodial sentence — whether sentence imposed wrong in principle — (FJ) Penal Code Act 17 ss 274, 274(a)(i), 279(1)(b).

In 1999, the Respondent was employed as a loans officer at the Colonial National Bank. In 2001, the Respondent erroneously arranged a letter offering a loan to a client and signed it in the client's name. Subsequently, the loan was approved. Accordingly, the Respondent on four separate occasions withdrew amounts from the loan account and deposited them into a certain account, used the money for himself but later paid them back. On a separate occasion, the Respondent likewise fraudulently converted $1500 and $500 he received from two different persons on behalf of the bank and used the same for himself.

The Respondent was charged of four counts of larceny by servant and on two counts of fraudulent conversion and pleaded not guilty on all counts. In 2003, the Respondent agreed to plead guilty as to the four counts. Later, the prosecution withdrew the charges as to the two counts (counts 5 and 6). After several adjournments, the hearing finally proceeded but the Respondent did not appear. Later, the Respondent pleaded guilty to all four counts of larceny by servant and admitted the facts. He was sentenced to a total of 18 months' imprisonment suspended for 3 years.

The State appealed against the sentence and submitted that the sentence imposed was wrong in principle and manifestly lenient because the maximum sentence for offences under s 274 of the Penal Code was 14 years' imprisonment.

On the other hand, counsel for the Respondent submitted that a sentence imposed in the lower court should only be varied on appeal on the ground that the court erred in principle. The counsel reiterated that all the matters raised on appeal were raised in the lower court and the learned magistrate merely exercised her discretion to suspend.

Held — A custodial sentence cannot be avoided where the accused pleads not guilty and does not make an attempt for genuine restitution. The same is true where there is a plea of guilty, there is bad breach of trust, the money stolen is high in value and there is no remorse or attempt at repatriation. However, it would be different if the accused is a first offender, pleads guilty and made full reparation of the sentencing hearing showing genuine remorse rather than attempt to escape a custodial sentence, a suspended sentence may not be wrong in principle. The Respondent in this case showed attempts of restitution. It would amount to injustice to impose a custodial sentence on him when he began to pick up the pieces of his life. The circumstances of this cases show that the learned magistrate did not err in suspending the Respondent's sentence.

Appeal dismissed.

Cases referred to

R v Barrick (1985) 81 Cr App Rep 78; 7 Cr App R(S) 142; *Gerald Panniker v State* [2000] FJHC 156; *State v Helen Broadbridge* Crim Case 31/1997; *State v Isimeli Drodroveivali* (HAC007/2002S); *State v Mahendra Prasad* [2003] FJHC 320; *Vishwajit Prasad v State* Crim App 23/1993, cited.

A. Prasad for the State

M. Raza for the Respondent

Shameem J. On 6 August 2003 the Respondent pleaded guilty to four counts of larceny by servant. He was sentenced to a total of 18 months' imprisonment suspended for 3 years. The State appeals against this sentence.

The charges, filed on 25 January 2002 in the Suva Magistrates Court read as follows:

FIRST COUNT

Statement of Offence

Larceny by servant: Contrary to section 274(a)(i) of the Penal Code Act 17.

Particulars of Offence

RAYMOND ROBERTS on the 30th day of July, 2001 at Suva in the Central Division being employed as a servant by Colonial National Bank stole $23,648.91 in cash, the property of the said Colonial National Bank.

SECOND COUNT

Statement of Offence

Larceny by servant: Contrary to section 274(a)(i) of the Penal Code Act 17.

Particulars of Offence

RAYMOND ROBERTS on the 31st day of August, 2001 at Suva in the Central Division being employed as a servant by Colonial National Bank stole $16,351.09 in cash, the property of the said Colonial National Bank.

THIRD COUNT

Statement of Offence

Larceny by servant: Contrary to section 274(a)(i) of the Penal Code Act 17.

Particulars of Offence

RAYMOND ROBERTS on the 29th day of October, 2001 at Suva in the Central Division being employed as a servant by Colonial National Bank stole $10,000.00 in cash, the property of the said Colonial National Bank.

FOURTH COUNT

Statement of Offence

Larceny by servant: Contrary to section 274(a)(i) of the Penal Code Act 17.

Particulars of Offence

RAYMOND ROBERTS on the 30th day of November, 2001 at Suva in the Central Division being employed as a servant by Colonial National Bank stole $15,860.00 in cash, the property of the said Colonial National Bank.

FIFTH COUNT

Statement of Offence

Fraudulent conversion: Contrary to section 279(1)(b) of the Penal Code Act 17.

Particulars of Offence

RAYMOND ROBERTS between 1st July, 2001 and 31st October, 2001 at Suva in the Central Division, being an officer of Colonial National Bank fraudulently converted $1,500.00 in cash which he received from Paras Ram s/o Ram Swaroop on behalf of the said Colonial National Bank.

SIXTH COUNT

Statement of Offence

Fraudulent conversion: Contrary to section 279(1)(b) of the Penal Code Act 17.

Particulars of Offence

RAYMOND ROBERTS between the 1 October 2001 and 31 October 2001 at Suva in the Central Division being an officer of Colonial National Bank fraudulently converted $500 in cash which he received from Bob Usman Ali s/o Abdul Rahim on behalf of the said Colonial National Bank.

The case was first called on 25 January 2002. The Respondent pleaded not guilty on all counts. He was not represented by counsel. The case was next called on 15 February 2002 when counsel appeared for him. The case was then adjourned to 18 June, 26 July, 23 August, 13 September, 4 October, 28 November 2002 and to 24 January, 7 March and 17 June 2003. From 24 January, the defence told the learned magistrate that they were adopting a "progressive approach" to the case. On 17 June 2003, the defence agreed to plead guilty to counts 1–4. On 1 July 2003, the prosecution withdrew counts 5 and 6. The matter was then

adjourned to 10 July 2003 for sentencing. On that day the Respondent did not appear and the sentencing hearing finally proceeded on 29 July 2003. The Respondent pleaded guilty to all four counts and admitted the facts. They were that in 1999, the Respondent was employed as a loans officer at the National Bank of Fiji trading as the Colonial National Bank. As loans officer, he falsely prepared a letter offering a loan to a Gur Swamy dated 29 January 1999. The loan was purportedly for the sum of $70,000 and the Respondent signed it as Gur Swamy. The "loan" application was approved. The Respondent then, on four separate occasions withdrew the sums of $23,648.91, $16,351.09, $10,000 and $15,860 from the loan account and deposited them into the account of one Roslyn Lata. He then withdrew each amount from that account and used the money himself. The last such withdrawal was on 30 November 2001. The Respondent, on 1 July 2003 had paid the bank back a total sum of $65,860.41.

In mitigation the defence called a character witness Reverend Immanuel Reuben, a Methodist minister. He said he had known the Respondent for 17 years as a member of the church. He said that he had officiated at the Respondent's wedding and that he had a daughter and a son. In the middle of 2002, he told Reverend Reuben about the offence and the reverend advised him to repay the money to the bank. Since the commission of the offences the Respondent has shown a commitment to the church, and has become more mature and responsible.

In mitigation, counsel said that the Respondent had worked for the National Bank for 13 years. He had been on a gross salary of $20,000 per annum and since his dismissal in January 2002 he was unable to find another job. In March 2003, he started his own business as a real estate agent. He said that the Respondent had suffered since January 2002 and that with a mortgage to the Housing Authority to the value of $120,000, his wife was forced to meet the mortgage obligations as the sole breadwinner.

He further said that although he had created the fictitious account, he had tried to repay the money by monthly instalments even before the bank discovered the theft.

Counsel asked for a non-custodial sentence saying that the Respondent was currently studying towards a diploma.

Sentence was delivered on 8 August 2003. The learned magistrate referred to the case of *R v Barrick* (1985) 81 Cr App Rep 78 (*Barrick*), a case which set down sentencing guidelines in fraud cases. She used as her starting point three-and-a-half-years-term imprisonment. After reducing for mitigating factors she arrived at an 18-month term which she decided to suspend on the basis of Fiji cases in which suspension had been ordered.

The State says that the sentence imposed was wrong in principle and manifestly lenient.

Counsel for the State submitted that the maximum sentence for offences under s 274 of the Penal Code is 14 years' imprisonment. She referred to *Barrick*, *State v Mahendra Prasad* [2003] FJHC 320 (*Mahendra Prasad*) and *Gerald Panniker v State* [2000] FJHC 156 (*Panniker*) and said that although an 18-month term of imprisonment was unexceptionable in a case of serious fraud, the suspension of that sentence was wrong in principle.

Counsel for the Respondent said that a sentence passed in the lower court should only be varied on appeal where the court had erred in principle. An appellate court should never simply substitute a sentence that it might have passed itself. He said that all the matters raised on appeal, had been raised in the

lower court, and the learned magistrate had merely exercised her discretion to suspend. That discretion was open to her.

In *Barrick*, the appellant, who had held a position of trust in a finance company, had stolen £9000. He pleaded not guilty and was found guilty. He was sentenced to 2 years' imprisonment. On appeal he asked for suspension of his sentence. The Court of Appeal held that in breach of trust cases, a term of immediate imprisonment was inevitable except in exceptional circumstances. Relevant matters were the quality and degree of trust abused, the period of defrauding, the use to which the money was put, the effect on the victim, the impact on the public, the effect on the offender, any delay between discovery and trial, and the offender's personal history. The court found that the 2-year term imposed was too lenient saying that a term of up to 18 months' imprisonment was appropriate for the theft of amounts up to £10,000, 2–3 years' imprisonment for the theft of amounts between £10,000 and £50,000, and terms of three-and-a-half-years–four-and-a-half-years for thefts of more than £50,000.

In *Panniker*, Pathik J adopted these guidelines in the case of a three-and-a-half-year-term imposed on an offender who pleaded guilty to the theft of $49,348.82 from his employer. He had maintained a not guilty plea from August 1999 to November 1999 when he pleaded guilty. There was no attempt at restitution until the day before the appeal hearing when the sum of only $10,000 was paid by the appellant's brother. Pathik J considered *Vishwajit Prasad v State* (unreported, Crim App 23/1993) (4 years reduced to two-and-a-half years) in which almost half of the amount stolen was paid back before the hearing, and *State v Helen Broadbridge* (unreported, Crim Case 31/1997) (two-and-a-half years' imprisonment for the theft of $24,147.55). His Lordship reduced the term for the restitution of $10,000 to one of 3 years' imprisonment.

In none of these cases had full and prompt restitution been made. In *Mahendra Prasad* Gates J considered sentence in a case very similar to this one. In that case the accused pleaded guilty on 12 counts of larceny by servant. The total stolen was $59,000. On discovery, he cooperated with the police and confessed to the stealing. He transferred his house and car to his employer to compensate him for the loss of the money and his employer accepted this and tried to persuade the DPP to withdraw charges. In total the accused paid back the money he had used and the money he said he had given to another employee. Gates J referred to a number of English authorities and to *State v Isimeli Drodroveivali* (unreported, HAC007/2002S) and found that in all cases, custodial sentences had been imposed, and that the tariff for the theft of $59,000 should lead to a sentence of imprisonment between 2 to 3 years. He distinguished those cases where the accused had pleaded not guilty or had not restored the money stolen and sentenced the accused to 2 years' imprisonment suspended for 3 years.

The principles that emerge from these cases are that a custodial sentence is inevitable where the accused pleads not guilty and makes no attempt at genuine restitution. Where there is a plea of guilty, a custodial sentence may still be inevitable where there is a bad breach of trust, the money stolen is high in value and the accused shows no remorse or attempt at reparation. However, where the accused is a first offender, pleads guilty and has made full reparation in advance of the sentencing hearing (thus showing genuine remorse rather than a calculated attempt to escape a custodial sentence) a suspended sentence may not be wrong in principle. Much depends on the personal circumstances of the offender, and the attitude of the victim.

In this case, the Respondent had made attempts at restitution even before the bank discovered the theft. This is highly significant. Further full restitution took place, not because of the prosecution, but because his pastor counselled him and was able to persuade him to be responsible and accountable for his actions. In making restitution, the Respondent was not buying himself out of trouble. His remorse was clearly genuine.

Further, the offences were committed in 2001, and he has suffered the consequences of his offending (both financially and socially) while his case was pending in the Magistrates Court. To impose a custodial sentence now, when he has begun to pick up the pieces of his life, would lead to injustice.

Finally, I am not told of the attitude of his employers in relation to the sentence imposed, but the fact that restitution was accepted by them suggests that there has been some degree of reconciliation in those quarters.

In all the circumstances, I do not consider that the learned magistrate erred in suspending the Respondent's sentence. This appeal is dismissed.

Appeal dismissed.