TIMOTHY AARON O'KEEFE v STATE (AAU0029 of 2007)

COURT OF APPEAL — APPELLATE JURISDICTION

WARD P, ELLIS and PENLINGTON JJA

15, 25 June 2007

Criminal law — sentencing — appeals against conviction and sentence — obtaining registration by false pretences, of obtaining money by false pretences, forgery and money laundering — whether method of calculating sentence was based on an error of law — sentencing must be based on relative seriousness of individual offences — magistrate considered extra dimension in sentencing that doubled sentence for substantive fraud — sentence was reduced — Penal Code s 311 — Proceeds of Crime Act 1997 s 69(3)(b).

The Appellant Australian national came to Fiji and joined a Fiji national in setting up a bogus loan company, Asia Pacific Finance. The Appellant placed advertisements that made the victims agree to enter loan agreements with the Appellant. The loan finance would be made available conditioned on payment of an advance fee described as a fee for the payment of transfer costs, insurance and exchange rate fluctuations. After the payments were made, the victims could no longer contact the Appellant and his co-accused. The Appellant and his co-accused were charged with one count of obtaining registration by false pretences, two counts of forgery and one of obtaining money by false pretences and money laundering. A total of $90,930.78 was received by the Appellant and his co-accused and less than $1500 was recovered. The Appellant pleaded guilty and was sentenced. The Appellant appealed against his sentence to the High Court but was dismissed. The Appellant appealed to the Court of Appeal and was given leave on the basis that the method of calculation of the sentence was based on an error of law.

Held — (1) The parliament imposed heavy penalties under the Proceeds of Crime Act for money laundering for being a serious offence. When sentencing in individual cases, the court should strike a balance between the seriousness of the offence as reflected in the maximum sentence available under the law and the seriousness of the actual acts of the person to be sentenced. The court should base its sentence on the relative seriousness of the individual offences when sentencing for the associated criminal offences which produced the money to be laundered.

(2) The magistrate erred in formulating the sentence for the money laundering (count five) when it reached the conclusion that the appropriate penalty for the principal fraud was 2 years' imprisonment and then considered the extra dimension demonstrated by the method of disguising the origin and nature of the funds. The magistrate gave a sentence which suggested adding a further 3 years' imprisonment which was more than double the sentence for the substantive fraud.

(3) The court concluded that even if the total sentence of 5 years was considered lenient, the sentence should be reduced because of the errors committed by the lower court in determining the sentence. Accordingly, the sentence of 3 years and 6 months' imprisonment was substituted in respect of count 5.

Appeal allowed.

No cases referred to.

Appellant in person

A. Driu for the Respondent

[1] Ward P, Ellis and Penlington JJA. The Appellant is an Australian national who came to Fiji using a false identity on 31 March 2005. Once here, he joined with a Fiji national in setting up a bogus loan company, Asia Pacific

Finance, and, through it, conducted an advance fee fraud. The business was conducted through advertisements placed in Australian newspapers and it appears all the money received came from Australia.

[2] The two men were charged with one count of obtaining registration by false pretences, contrary to s 311 of the Penal Code, two of forgery and one of obtaining money by false pretences contrary to ss 311 and 309(a) respectively of the same Act and money laundering, contrary to s 69(3)(b) of the Proceeds of Crime Act 1997.

[3] It is only necessary to deal very briefly with the details of the fraud. It appears that over 200 potential victims responded to the advertisements. Most did not pursue it any further but 51 ultimately agreed to enter into a loan agreement with the fraudsters. They were promised that loan finance would be made available to them conditional on payment of an advance fee described in the correspondence as a fee for the payment of transfer costs, insurance and exchange rate fluctuations. Following payment, all contact ceased and the Accused used the money for their own purposes. A total of $90,930.78 was received by this means and less that $1500 has been recovered.

[4] It was a well-conducted and potentially very lucrative fraud.

[5] The Appellant pleaded guilty in the Magistrates' Court and was sentenced as follows:

> Count 1 (registration) 6 months imprisonment
> Count 2 (forgery) 6 months imprisonment
> Count 3 (forgery) 6 months imprisonment
> Count 4 (false pretences) 2 years imprisonment
> Count 5 (money laundering) 5 years imprisonment
> All concurrent to give a total of five years imprisonment.

[6] He appealed against sentence to the High Court and the appeal was dismissed by the learned judge. He now appeals to this court. He has been given leave on the basis that the method of calculation of the sentence was based on a error of law.

[7] In a detailed judgment, the learned High Court judge pointed out:

> The learned sentencing magistrate clearly had it in mind to deter similar would be offenders. However, no sentencing precedents were considered and there are no discernible reasons as to how the sentence was constructed. There is no allocation of an appropriate starting point, consideration of aggravating features, overt calculation of a maximum available penalty and then discount for mitigating features. In that regard I agree with the submission of the appellant that the sentence is wrong in principle. The impact of deterrence and denunciation is completely lost when the sentence fails to enunciate a method by which the ultimate duration of penalty is transparently constructed.

[8] The judge considered that the charge of obtaining the $90,930.78 by false pretences "went to the heart of the offending". He dismissed the appeal against the sentence on that count and explained:

> Taking into account the aggravating circumstances in particular the premeditation and planning that was used to perpetuate this sophisticated fraud I would have thought an available aggravated penalty for this offending would have been 4 years imprisonment. Even allowing for the early plea and other mitigating features, a sentence of two years imprisonment was in my view lenient.

[9] He pointed out that the money laundering count:

> … was the count that preoccupied the mind of the sentencing magistrate. In his view money laundering was the pivotal and most serious of these offences. It carries a maximum available sentence of 20 years imprisonment.

[10] The judge then conducted a careful analysis of the levels of sentences in other jurisdictions and equated them to the available penalty in Fiji. It was a careful and well-calculated exercise.

[11] The activities of this Appellant which constituted the money laundering offence were the adoption of false identities and the use of bank accounts in those names to disguise the true origin of the money thus allowing the Accused to expend it on the purchase of home equipment, home appliances and an extravagant lifestyle. The judge concluded also that there was an irresistible inference that a substantial sum of money from the fraudulent activity was not spent in that way and remains unrecovered.

[12] In respect of the money laundering, the judge listed four matters that he felt should be taken into consideration in addition to such factors as the degree of participation and the Accused's previous history:

- — Pre-meditation, planning and sophistication of the money laundering method
- — Amount of money laundered and frequency of transactions
- — Co-operation with the police, recovery of the laundered money, forfeiture of proceeds of crime
- — Evidence of re-investment of proceeds in other criminal activity.

[13] He then concluded:

> It is precisely that type of money laundering activity that attracts the need for a stern and deterrent sentence. I keep in mind this was not drug related offending and no arithmetical relationship between the sums involved and sentence should be attempted but I do observe that in my view the sentence within the available tariff range was lenient.

[14] It is clear the magistrate also considered the charge of money laundering to be the most serious of the offences. In his sentencing judgment he pointed out:

> The accused who is an Australian expatriate obviously studied our banking system carefully before using the said system to facilitate and perpetrate his dishonest and criminal activities. The accused also clearly used this scheme to lure unsuspecting innocent victims to part with their hard-earned money … There has been a long standing suspicion by the law enforcement agencies that the offence of money laundering is already taking place in Fiji, and this case confirms their suspicion beyond any doubt now. Therefore, our financial institutions need to exercise more care to avoid being used as conduits of "white collar crime". The sophisticated fraudulent scheme used by the first accused was evidently to profit from the earnings of innocent victims and fortunately the scheme was uncovered quickly thereby stopping even larger sums being taken. In the outcome and without doubt, a profound deterrent sentence is warranted to reflect the seriousness of the offences and to be a strong warning to expatriates and like minded persons that the courts will come down hard for such offences … It is … very clear to the court that the first accused is the mastermind behind this fraudulent scheme. The gravity of the offences is also depicted by the lengthy tariffs legislated by Parliament, for example, count five carries a maximum sentence of 20 years.

[15] When sentencing in individual cases, the court must strike a balance between the seriousness of the offence as reflected in the maximum sentence available under the law and the seriousness of the actual acts of the person who is to be sentenced. Money laundering is clearly potentially a very serious offence.

It can be, and is, used to disguise the true nature of money derived from criminal activity and so make it available for legitimate use. It is essential for large criminal organisations if they are to be able to maximise the proceeds of their unlawful activities. Of necessity, it is an international problem and undoubtedly smaller jurisdictions may be seen as useful and unsuspecting conduits. That is why Parliament imposed the heavy penalties under the Proceeds of Crime Act.

[16] However, where, as here, the court is also sentencing for the associated criminal offences which produced the money to be laundered, it must base its sentence on the relative seriousness of the individual offences.

[17] The substantial sum of money obtained in this case was the result of the offences other than money laundering. That it was a well-planned, selfish and nasty offence is clear and the court is entitled to look at the degree to which it succeeded and the potential for further fraud if it had been able to continue. All those matters suggest the penalty for false pretences should be substantial as the learned judge stated.

[18] On the facts before him the magistrate, having properly decided that the sentences should all be served concurrently, had passed a sentence of 2 years for the matters other than the money laundering. He then moved to consider the money laundering aspect of the case.

[19] It must be borne in mind that he had already punished the actual activity which extracted the sum of $90,930.78 with the sentence of 2 years. The additional factors which led to the money laundering offence were the means by which the true nature of those funds was disguised.

[20] The overall fraud was clearly well-planned in advance and reasonably sophisticated but the actual laundering method was only part of that. The elements which effectively allowed the money to be laundered such as the use of bank accounts in false names and the use throughout of false identities were equally part of the fraud itself.

[21] When the magistrate was formulating the appropriate sentence for the money laundering he had already reached the conclusion that the appropriate penalty for the principal fraud by which the victims were relieved of their hard earned cash was 2 years' imprisonment. He then passed to a consideration of the extra dimension demonstrated by the method of disguising the origin and nature of the funds on which they were living and probably furthering this or other criminal activity. Having done that he passed a sentence which suggested that final count should add a further 3 years' imprisonment — more that double the sentence for the substantive fraud.

[22] In that he erred and, in accepting it, so did the learned judge.

[23] We dismiss the appeal against the sentences on counts 1–4. We are satisfied that the money laundering aspect of this case would be properly marked by an additional sentence of 18 months' imprisonment. We therefore quash the sentence on count 5 and substitute one of three-and-a-half years' concurrent to the other sentences making a total sentence of three-and-a-half years' imprisonment.

[24] Before leaving the case we would comment on one further aspect which the Appellant has raised before us and which the judge also considered in the High Court.

[25] The Appellant told the court of the difficulties he was experiencing in prison largely as a result of being an expatriate and the poor conditions under which he was being kept. We accept that any person serving a sentence in a

foreign gaol is likely to suffer more than he would if serving in his home country. The judge clearly considered that when he said:

> The treatment of foreign prisoners in overseas jails has been a matter of much attention and human rights jurisprudence. I accept the general principle that foreign prisoners do "hard time" in overseas jails. They are isolated and separated from any family or other support structures in a cultural setting that is often completely alien.
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> I accept that this appellant will find the consequences of his offending and duration in prison a harsh and bitter reality … [A]s long ago as 1985 the International Bar Association encouraged state parties … to develop model agreements for the transfer of foreign prisoners … Australia has many such agreements with foreign states but none yet with Fiji …
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> I accept what counsel told me from the bar. Irrespective of nationality all prisoners in Fiji are entitled to a standard one-third remission of their sentence. However, I further accept that foreign prisoners having no ties to the Fijian community are unlikely to receive the benefit of an extra mural release.

[26] He then correctly declined to consider the effect of the unavailability of extra mural release as a factor when determining sentence.

[27] We accept the judge's comments and the submissions of the Appellant that he is having a particularly difficult and unpleasant time in prison. However, he is serving a sentence for serious offences committed here. We agree with the learned judge that even the total sentence of 5 years could be considered lenient and we have, because of the errors in the method of determining the sentence by the lower court, had to reduce it further.

[28] The fact remains that any foreigner who comes to Fiji to commit offences against people in Fiji or abroad knows that, if he is convicted, he will be sentenced under the laws of Fiji. That, we have no doubt, goes with a full realisation that if sentenced to a term of imprisonment he will serve it in a Fiji gaol out of touch with his family. It does not take much inquiry to ascertain that the conditions may be well below those in the criminal's home country. Such considerations will be part of his evaluation of the potential of the offences planned.

[29] We see no reason why it should be taken into account by the sentencing court. To do so would effectively mean that foreigners who take advantage of the situation in Fiji will receive a lesser penalty than those imposed on its citizens for similar offences.

[30] This Appellant must realise that, while the method of calculation of the sentence by the lower court has resulted in a reduction of his sentence, he and others like him will not assist their case by pleading that the sentence is harsher or less comfortable than a sentence for a similar offence in their own country. The effective way of avoiding that is to avoid offending here.

Result

Appeal against sentence on counts 1–4 dismissed. Appeal against sentence on count 5 allowed. Sentence of 5 years' imprisonment on count 5 quashed and a sentence of three-and-a-half years' imprisonment substituted.

Appeal allowed.