

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

CRIMINAL CASE No. 29 of 2020

BETWEEN:

THE QUEEN

and

KERRON FAGON

Appearances: Mr. Kael E. London, Counsel for the Crown
Ms. Reynela Rawlins, Counsel for the Defendant

**2021: May 11th
July 7th**

JUDGMENT

[1] **FLOYD J:** The Defendant was born on 14th March, 1994. She is charged with one count of Theft, contrary to **s. 209 (b)** of the **Criminal Code 1997**. On 11th May, 2021, at the request of the Defendant, a Goodyear Indication was provided. On the same date, the Defendant was arraigned and entered a guilty plea. A Social Inquiry Report was ordered and it has been received. This matter now proceeds to sentencing.

THE FACTS

[2] The Defendant was a customer and personal account holder at Scotia Bank BVI Ltd. On 28th March, 2019, \$20,809.51 USD was deposited in error into her bank account. It was not, however, until 3rd September, 2019 that the error was discovered. The Assistant Bank Manager was advised by what is described as a “third party”, that the bank had deposited the funds into the account of the Defendant, in error. As a result, the Defendant was contacted on 4th September, 2019 and invited

to attend at the bank branch. The Defendant complied and met with the Senior Branch Manager and two Assistant Managers on 5th September, 2019. When confronted with the information regarding the deposit, the Defendant confirmed that she had not been expecting to receive those funds. She went on to say that she contacted the Scotiabank Call Centre regarding the use of the funds she had discovered. She told bank personnel that the Call Centre representative had advised her that she could access the funds. As a result, the Defendant withdrew \$1,000.00 USD on 3rd April, 2019 using the Automated Teller System. Later that same day, the Defendant withdrew \$19,000.00 USD in person at the bank counter.

- [3] Upon further investigation, the bank staff concluded that the funds had been intended for another client's account but were deposited in error into the Defendant's account. Prior to this deposit, the Defendant's bank account had a consistently minimal balance. The Defendant told bank staff that she had used the money for herself, spending it on personal items. The Defendant was told that she would have to repay the money to the bank. She agreed but requested time to make arrangements. When bank staff heard nothing more from the Defendant, the matter was reported to police on 17th September, 2019.
- [4] On 19th September, 2019, the Defendant was arrested. She was cooperative with police and under caution, admitted her role in the offence. Although the exact date is unclear, bank officials later advised police that "some time after her arrest," the Defendant repaid the sum in full.

SENTENCING BACKGROUND

- [5] A Social Inquiry Report was ordered to determine whether any counselling services existed that could assist the Defendant in the area of theft prevention and financial management. As a result, a very helpful Report was received from P/O Wheatley, indicating that four different agencies could provide such counselling.
- [6] Defence Counsel also provided the Court with a letter of apology dated 24th May, 2021 from the Defendant. She realizes the consequences of her actions and accepts full responsibility.

- [7] The Court was also provided with a reference letter dated 21st May, 2021 from the Defendant's employer, Leando Frett. The letter describes the Defendant as a reliable and pleasant worker, employed in the position of cashier for four years.
- [8] Counsel for the Defendant submits that there was no planning for this offence on the part of the Defendant. She has entered an early guilty plea. She is remorseful, as confirmed by her letter. She has no prior criminal record and is a person of good character. She was cooperative with police and has repaid the corporate victim in full. All of that is indeed true.

THE LAW

- [9] Sentencing in criminal cases involves many considerations. In fashioning a sentence appropriate to the facts of the case and the characteristics of the offender, the court must consider the principles set out in cases such as **R. v Sargent, 60 Cr. App. R. 74**, referred to with approval by our appellate court in the seminal case of **Desmond Baptiste v The Queen, Saint Vincent and the Grenadines Criminal Appeal No. 8 of 2003**. In the words of Lawton L.J. in the case of **R. v Sargent**, the court endeavours to answer the question, "What ought the proper penalty to be?" Sentencing seeks to promote respect for the law and an orderly society. The sanctions imposed by a sentencing court when fashioning the proper penalty are based upon the classic principles of sentencing. In **R. v Sargent**, those principles include:
- (a) Retribution, the court must reflect society's abhorrence of particular types of crime through punishment of such unlawful conduct.
 - (b) Deterrence, specific to the offender and generally to likely offenders or persons who may be minded to commit similar offences.
 - (c) Prevention, to protect the public from offenders who persist in committing crimes by separating them from society.
 - (d) Rehabilitation, to engage offenders in activities designed to assist them in their reintegration into society.

- [10] The court in the **Desmond Baptiste** case confirmed at **paragraph 20** that “perhaps the most difficult and controversial area for the sentencer is fitting the punishment to the crime committed.” The court went on to state that the age of the offender and the presence or lack of any criminal record were factors to consider.
- [11] Sentencing considerations go further. Although denunciation may be required, there is also a need to promote a sense of responsibility in the offender and to acknowledge the harm done. To do that, one must return to a weighing of characteristics of the offender with the facts surrounding the offence. The sentence must also be proportionate to the gravity of the offence and the degree of responsibility of the offender. Has, for example, a guilty plea been entered? All of these considerations play a role in determining a fit sentence.
- [12] The offence of Theft carries a maximum penalty of imprisonment for a term not exceeding ten (10) years. This offence is enumerated in the Compendium of Sentencing Guidelines for the Eastern Caribbean Supreme Court. Assistance is provided therein for crafting sentences generally and in particular as it relates to offences of dishonesty.
- [13] Crown Counsel referred the Court to the case of **R. v. Barrick (1985), 81 Cr App 78** as being locus classicus for sentencing in this type of offence. However, upon review, the Court finds this case to be applicable to cases involving a breach of trust. That decision, at **para 10**, indicated that “the type of case with which we are concerned is where a person in a position of trust, for example, an accountant, solicitor, bank employee or postman, has used that privileged and trusted position to defraud his partners or clients or employers or the general public of sizeable sums of money”. With respect, that is not the situation in the case at bar.
- [14] This Defendant was not employed by the corporate victim. She was a customer of the bank, making use of their financial services. She conducted her banking business through the company’s facilities. Although the Defendant could be considered a client of the bank, I do not find that such a relationship engaged any position of trust on her part. Had such a relationship been present, I agree with the Court in the **Barrick** case that a term of immediate imprisonment is inevitable, save in very

exceptional circumstances or where the amount of money obtained is small. However, that is not the situation here.

- [15] Although a relationship of trust is not in play in this case, that is not to say that the behaviour of the Defendant was not serious and wholly inappropriate. She took advantage of an accounting error by her bank, a large corporation with immense assets, for her own benefit.
- [16] Crown Counsel also referred the Court to the case of **The Queen v. Monique Farrington, Case No. 19 of 2002**. In that case, the Defendant was found guilty after trial of three counts of theft. She was sentenced to a term of probation with conditions including reporting to a medical doctor and to make restitution in the sum of \$8,000.00 USD. That case is of assistance to the Court.

FORMULATION OF SENTENCE

- [17] In crafting this sentence, the Court has relied upon the general provisions of the Eastern Caribbean Supreme Court Sentencing Guidelines for Offences of Dishonesty, specifically Theft. In establishing a starting point for sentence, the court has considered several issues. Although the amount of money stolen was substantial, it was not of such a value that it would have caused significant financial harm to the corporate victim. The impact of the theft on the business would have been negligible. That is not to say that the wealth of a victim should in any way justify a perpetrator's behaviour. However, as I am bound to consider, I can find no consequential harm to this victim in these circumstances. I bear in mind as well that the cause of the financial irregularity was an accounting error on the part of the victim. That does not justify the behaviour of the Defendant in taking advantage of that error. However, it emphasizes the total lack of planning on the part of the Defendant. With little or no harm caused to the corporate victim, I place this matter in category 4, lesser consequence.
- [18] In terms of the culpability of the offender and the level of seriousness, I note there was essentially no planning involved on the part of the Defendant. It appears that she had limited awareness or understanding of the situation that led to the offence. As I have already noted, the Defendant took advantage of an accounting error that placed a sum of money into her account. That error was not even detected by officials from the bank until approximately five months after the fact when a "third

party” alerted the Assistant Manager to the loss. I would therefore assign this to level C, lesser seriousness.

- [19] By combining the first and second stages, I find the starting point for sentence to be non-custodial.
- [20] When examining the aggravating and mitigating factors relating to the offence, I am satisfied that the Defendant was motivated by greed. She took the entire amount available as soon as she became aware of it. She then quickly disposed of the funds for her own benefit. However, to her credit, she has repaid the amount in full. Something that, it appears, would not have been easy for her.
- [21] In considering the aggravating and mitigating factors as they relate to the offender, I note that she has no previous criminal record. She is a person of good character. She cooperated with the authorities, including bank officials and police investigators. She did not hide from the allegations. She spoke to the bank staff and gave a statement under caution to the police. She admitted her role and accepted responsibility. She is remorseful.
- [22] I give the Defendant full credit for her guilty plea, entered as it was at an early opportunity. I understand that the Defendant did not serve any time in pre-trial detention, being released after being charged.
- [23] I take all of these considerations into account when formulating an appropriate sentence in this case. This is a serious matter but the Defendant has taken positive steps to deal with it. In considering the principles of sentencing, I do not find the need for deterrence or denunciation to be emphasized. The Defendant has taken responsibility for her actions and has paid back her debt to the victim. I do, however, find that her behaviour indicates that she could benefit from counselling. By way of rehabilitation, that would assist her. Furthermore, to impose a criminal record on the Defendant in these circumstances would not be productive. The Defendant is 27 years of age. She is still a young woman with a bright future ahead of her.

[24] Under the provisions of **s. 21 of the Criminal Justice (Alternative Sentencing) Act and ss. 2 (2) of the Probation of Offenders Act CAP 61**, I am satisfied that, having regard to all of the circumstances, including the nature of the offence and the character of the offender, it is not expedient to inflict any punishment upon her, other than probation. The Defendant will therefore be conditionally discharged and placed on probation for a period of 12 months. The terms of the order will be as follows:

- Keep the peace and be of good behaviour.
- Report to and be under the supervision of a probation officer.
- Appear before this Court when required to do so.
- Notify the probation officer and this Court in writing and in advance of any change of address or employment.
- Attend for and accept such treatment and counselling as may be arranged by and through the probation officer in the area of theft prevention and financial management.
- A written progress report shall be submitted to this Court by the probation officer at the 90 day and 6-month periods of the probation term.

[25] The Defendant is conditionally discharged and the total sentence is therefore 12 months' probation with terms as described. That accords with the sentence contemplated by the Goodyear Indication.

**Richard G. Floyd
High Court Judge**

By the Court

Registrar