

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES**

IN THE HIGH COURT OF JUSTICE

CASE NO. GDAHCR 2017/0042

BETWEEN:

REGINA

V

DWIGHT MC SWEEN

Appearances:

Mr. Brendon La Touche for the Prosecution
Mr. George Prime for the Accused

2017: October 20.

SENTENCING JUDGMENT

Criminal law – sentencing – Offences of dishonesty – Stealing by reason of employment – Principles of sentencing - Restorative justice – Aggravating and mitigating factors – Consideration of dependents and family – Impact of custodial sentence – Suspended sentences – Individual and general deterrence.

[1] **AZIZ, J.:** On the 5th September 2017, the Learned Director of Public Prosecutions indicted Mr. Dwight Mc Sween (“the defendant”), on two counts of stealing from Independence Agencies Limited (“IAL”), fourteen cases of Du Maurier cigarettes valued at \$35,091.00 Eastern Caribbean Currency and fifteen cases of Du Maurier cigarettes valued at \$37,597.50 Eastern Caribbean Currency respectively.

- [2] The defendant, pleaded guilty to both offences of stealing on the 2nd October 2017, this was the first reasonable opportunity to enter pleas, as this case was committed on the papers.

Summary of the offences

- [3] The circumstances leading to the commission of the offences were set out fully on behalf of the prosecution and agreed by the defence.
- [4] IAL an import and distribution company is located on the Maurice Bishop Highway, dealing with mainly foodstuff, household items, alcoholic beverages and tobacco products. It was brought to the attention of the sales manager Mr. Sylvester that there were discrepancies in the tobacco stock, and an investigation was launched internally. As part of that investigation the security cameras were checked, and it revealed that the defendant, Mr. Mc Sween, had visited the premises and collected cigarettes on the 27th and 30th of October 2015. It transpired that the defendant had an invoice but received more than what was stated on the invoice. It should be noted that the defendant was a previous employee of IAL.
- [5] The financial controller recalled the defendant working as an assistant warehouse manager, whose employment was terminated on the 29th July 2015. As a result of the investigation, the cameras were looked at on the 27th October 2015 and the financial controller noticed the defendant receiving twenty-four cases of Du Maurier 20's cigarettes, but was only billed for ten cases. On the 30th October 2015, the defendant was seen in the yard of IAL. IAL's sales history does not show the defendant purchasing any cigarettes on that day but the cameras showed him collecting fifteen cases of the Du Maurier 20's cigarettes.
- [6] As far as the billing procedures at IAL are concerned, a person would go in or call in to make an order, and they would speak to the billing clerk depending on whether it was a cash or charge bill. If a cash customer, the billing clerk would

take the order and give the customer three copies of the bill, and this would be taken to the cashier who would take payment and then stamp the bill, keeping a yellow copy of the bill and giving the customer the white and pink copies. The customer would then go and collect the goods from the warehouse or have them delivered. The cashier was shown a copy of an invoice and bill for the 27th October 2015 and saw 10 cases of cigarettes purchased and valued at \$32,012.75, with her signature and others. For the 30th October 2015, there were invoices shown but there was nothing about the purchase of cigarettes that was evident.

[7] The manager of CK's Super Value located in Grand Anse, went to IAL on the 30th October to collect some goods and noticed that the defendant was there. The manager also noticed a large number of cases of the Du Maurier cigarettes on the ground close to a van, and assumed that the defendant was trafficking cigarettes to Trinidad.

[8] The defendant was arrested, cautioned and interviewed on the 9th November 2015 and stated that he worked for himself and his business was DC & Sons Distribution, which dealt with the supply of drinks and dry goods on a wholesale basis, and that he would sell cigarettes to traffickers. He would purchase goods from IAL every week depending on his sales. The defendant denied that on the 27th October 2015, he left the compound of IAL with more than 10 cases of cigarettes. He denied that he stole fourteen cases of cigarettes. As for the 30th October 2015, the defendant denied stealing fifteen cases of cigarettes from IAL.

The Law

[9] Section 274(1) of the Criminal Code as amended by section 44 of the Criminal Code (Amendment) Act 2012 states that a person who is convicted of stealing in any case in which some other punishment is not provided for under this title, commits an offence and is liable on conviction on indictment to a term of

imprisonment not exceeding fifteen years. Although the legislation is clear that a person who is convicted of stealing as in this case from a shop or warehouse under section 275 could be sentenced to a maximum of twenty years imprisonment.

- [10] Section 275 (a) of The Criminal Code as amended by Section 45 of the Criminal Code (Amendment) Act states:

**“Stealing in special cases and from the person
(See 95(2)(3))**

275. A person who is convicted of –

- (a) Stealing anything of which he had the custody, control or possession, or to which he had the means of access, by reason of any office, employment or service;
- (b) Stealing from in or any dwelling house, shop, garage, manufactory, warehouse or vessel;
- (c) Stealing from or in any place of worship;
- (d) Stealing from the person;
- (e) Stealing any cattle, not being goat or swine, the value of which cattle does not exceed two hundred dollars; or
- (f) Stealing any pole, wires, or apparatus used for the purposes of any telegraph or telephone,

commits an offence and is liable on conviction on indictment to a term of imprisonment not exceeding twenty years.”

Court's Considerations

- [11] In the case of **Regina v Joseph Brice**¹, the Learned Judge stated that ‘the responsibility of any court is to impose a just sentence having regard to all the circumstances of the case, the offender and to implement the aims of sentencing which in the main are punishment, rehabilitation and deterrence.
- [12] The Court is guided by sentencing principles² such as retribution, deterrence, prevention and rehabilitation and takes into account all the aggravating and mitigating factors.
- [13] When considering the sentences that must be passed for a particular offence or offences the sentencing judge must examine each case carefully. In considering the case before the Court there must be an assessment on whether an immediate custodial sentence is the only realistic option, bearing in mind the considerations in **Desmond Baptiste v R**³. If the sentencing court is of the opinion that a custodial sentence is the only realistic option then such sentence is to be as short as possible. This, as said before, is consistent with the duty to protect the interest of the public and to punish and deter the offender and potential future offenders.
- [14] In cases where a short custodial sentence is being considered, that, in my view being 12 months in certain instances, then the Court should ask itself, particularly where the defendant has not been incarcerated before, whether a shorter sentence might be equally effective in advancing the principles of sentencing. In other words where the Court was considering a sentence of 12 months a sentence of 9 months may be just as effective or 2 months instead of 4 months.

¹ Anguilla Case No. 8 of 2015

² Desmond Baptiste v R, Criminal Appeal No 8 of 2003.

³ Supra 1.

Prosecution submissions

- [15] Mr. La Touche for the Prosecution submits that the defendant has by his plea now been convicted of two counts of stealing which are serious offences. Some of the aggravating circumstances include that the defendant was a former employee of IAL, in a senior position as a warehouse supervisor between 2006 to July 2015. Mr. La Touche states that the defendant was someone that the company trusted and there was a previous incident where IAL noticed a discrepancy of about \$30,000.00 whilst the defendant was employed on their sales van. This money still has not been repaid.

Defence submissions

- [16] Mr. Prime on behalf of the defendant, starting out by making some corrections to the list of antecedents. Mr. Prime submits that there are aggravating factors (seriousness of the offence, breach of trust). The mitigating factors, he further submits, included a guilty plea at the earliest opportunity, a man of previous good character and the fact that there was a paper committal, an indication, he says, that the defendant did not want to waste the Court's time and expense involved in going through a preliminary inquiry. Counsel states that the defendant is now employed with Palms Grenada Limited as a project supervisor and urges the Court to adopt an approach that can be best described as 'Rehabilitative and Restorative Justice'. This he submits is an appropriate approach for an offender's first involvement in offending behavior.
- [17] In the case of **The Queen v Monnalyssa George**⁴ the Court referred to the case from the Supreme Court of Canada, **R v Proulx** 2000 1 S.C.R 61 in which it was stated:

⁴ SLUCHARD2013/1682, Ramdhanie J. (Ag.) at Page 5, Para 14.

“Restorative justice is concerned with the restoration of the parties that are affected by the commission of an offence. Crime generally affects at least three parties: the victim, the community, and the offender. A restorative justice approach seeks to remedy the adverse effects of crime in a manner that addresses the needs of the parties involved. This is accomplished in part, through the rehabilitation of the offender, reparations to the victim and to the community, and the promotion of a sense of responsibility by the offender and acknowledgment of the harm done to the victims and to the community.”

[18] This Court has stated in the case of **R v Elvin Chitan**⁵ that at the end of the day, a sentencing court must not only deter the offender from any further criminal activity, but ensure that they and others tending to lean towards a life of crime can take two steps back and continue onto the path of an honest and productive life in society. In this particular case there is no evidence to suggest that this defendant will be encouraged into further crime and therefore does not need a deterrent sentence but a sentence must be passed for general deterrence. A sentence must also be passed that would reflect the Court’s abhorrence of these types of crimes through punishment, but must balance that against a sentence that would allow the defendant to be useful and productive in society.

[19] The case of **Proulx**⁶ also set out the following:

“Where a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than incarceration. Where objectives such as denunciation and deterrence are particularly pressing, incarceration will generally be the preferable sanction. This may be so notwithstanding the fact that restorative goals might be achieved. However, a conditional sentence may provide

⁵ GDAHCR2016/0037.

⁶ [2000] 1 S.C.R 61.

sufficient denunciation and deterrence, even in cases in which restorative objectives are of lesser importance, depending on the nature of the conditions imposed, the duration of the sentence, and the circumstances of both the offender and the community in which the conditional sentence is to be served. A conditional sentence may be imposed even where there are aggravating circumstances, although the need for denunciation and deterrence will increase in these circumstances.”

Guidelines

- [20] In Grenada, and other OECS territories there are no sentencing guidelines, but within time there will be to ensure that the courts are uniformed and consistent in their approach to sentencing, bearing in mind that guidelines are merely such and do not bind the sentencing judge or put them in a straitjacket. This Court has considered the UK Definitive guidelines on theft offences in which the maximum sentence is seven years imprisonment for theft from a shop or stall.
- [21] In the United Kingdom Guidelines, there is reference to culpability ranging from high to lesser and also to harm. Culpability is determined by weighing up all the factors of the case to determine the offender's role to determine the extent to which the offending was planned and the sophistication to which it was carried out. As far as culpability it would seem that this case is one in which there was some degree of planning.
- [22] Harm is assessed by the financial loss that results from the theft and any other significant harm suffered by the victim such as emotional distress, damage to the business, damage to property, a greater impact on the victim due to the size and type of the business. In this case the Court would consider that the goods stolen would be classed as medium value, considering the nature of the business involved.

- [23] The Court must consider what the notional starting point would be. In doing so, this Court has considered cases ranging from 2010-2015. The Court considers that this is a case in which the aggravating factors of the offence are the stealing being deliberate and intentional; the planning involved; sophisticated nature of offence; stealing on more than one occasion; stealing for financial gain; breach of trust; and a leading role played.
- [24] The Court has already alluded to the United Kingdom Sentencing Guidelines and on considering the offence only, this Court finds that the starting point is four years imprisonment. There are no mitigating circumstances of the offence.
- [25] As far as the offender is concerned, the aggravating circumstances are the fact that the defendant is a previous employee and would know the running operation of the company and he stole goods which were to order. The mitigating factors are the paper committal saving court time, early guilty plea, good character, remorse and the main provider for his young children and family. The starting point would therefore be adjusted downwards by one year.
- [26] As the defendant pleaded guilty at the earliest opportunity and there was a paper committal, the full credit of one third will be allowed. There is also no time spent on remand to be credited towards the sentence.
- [27] Although this case is not directly theft from employer⁷, or a case in which there is stealing by reason of employment, there are many principles which are the same as it is a dishonesty offence. The House of Lords case of **R v Barrick**⁸, gave guidance on some of the considerations that ought to apply when dealing with cases of this kind involving breach of trust. In the **Barrick** case Lord Lane CJ, delivering the judgment of the English Court of Appeal laid down detailed

⁷ The defendant was previously employed by IAL and had a senior position as a manager, therefore in this Court's view breach of trust is a factor to be considered. The defendant would have known the intricate details of how the business operated and also known the other employees currently employed at IAL.

⁸ [1985] 7 Cr.App. R. 142.

guidelines for sentencing in cases of theft and dishonesty constituting a breach of trust by employees and professional persons. The appellant, a man aged 41 of previous good character, was convicted by a jury of four counts of false accounting, four counts of obtaining by deception and two counts of theft. The appellant was employed as the manager of a small finance company, and over a period of time stole a total of at least £9,000. He was sentenced to 2 years imprisonment on each count, the sentences to be concurrent.

[28] Lord Lane CJ stated at 145:

"This case provides us with an opportunity to make some observations upon the proper sentence to be passed in respect of certain types of theft and fraud as to which there has been recently some divergence of opinion. 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. He will usually, as in this case, be a person of hitherto impeccable character. It is practically certain, again as in this case, that he will never offend again and, in the nature of things, he will never again in his life be able to secure similar employment with all that that means in the shape of disgrace for himself and hardship for himself and also his family."

[29] In **Jacob**⁹ a solicitor who had over a period of some 3 years stolen money from clients and his partners to the tune of between £40,000 and £57,000 had his sentence of 4 years imprisonment reduced by English Court of Appeal to 18 months.

⁹ (1981) 3 Cr. App.R(S) 298.

[30] In **Milne**¹⁰ the English Court of Appeal following the decision in **Jacob** substituted for the sentence of 3 years imprisonment imposed upon a solicitor who had stolen some £40,000 from his client's account, the term of 18 months imprisonment, a quarter of which was suspended, leaving some thirteen and a half months to be served.

[31] The English Court indicated that they could see no proper basis for distinguishing between cases of this kind simply on the basis of the defendant's occupation. Professional men should expect to be punished as severely as the others; in some cases more severely, and this Court certainly agrees with that approach.

[32] The Court went on to state:

"It is, we appreciate, dangerous to generalise where the circumstances of the offender and the offence may vary so widely from case to case. In the hope that they may be helpful to sentences generally, and may lead to a little more uniformity, we make the following suggestions.

*In general a term of immediate imprisonment is inevitable, save in very exceptional circumstances or where the amount of money obtained is small. Despite the great punishment that offenders of this sort bring upon themselves, the court should nevertheless pass a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence. The sum involved is obviously not the only factor to be considered, but it may in many cases provide a useful guide. Where the amounts involved cannot be described as small but are less than £10,000 or thereabouts, terms of imprisonment ranging from the very short up to about 18 months are appropriate (see for example **Weston** [1980] 2 Cr. App. R(S) 391). Cases involving sums of between about £10,000 and £50,000 will merit a term of about 2 to 3 years' imprisonment. Where greater sums are involved, for*

¹⁰ [1982] 4 Cr. App.R(S) 397.

*example those over £100,000, then a term of 3½ years to 4½ years would be justified (see for example the case of **Strubell** [1982] 4 Cr. App. R(S) 300). In that case the defendant was employed as an accountant. He pleaded guilty to offences involving it seems over £150,000. A sentence of 3 years imprisonment was substituted for the 5 years imposed at trial.”*

[33] In **Regina v Joseph Brice**¹¹, the defendant was sentenced to 1 year and 6 months imprisonment for theft. Mr. Brice was convicted after a trial lasting one and a half weeks. The defendant was the director of a company which was responsible for the management of another company. On the 10th December 2008 the defendant requested an unusual loan of \$900,000.00 by email from the business he was managing. Due to time difference of six hours, the email was not read until the next day the 11th December 2008. By the time the email had been read, the defendant had already instructed the Bank in Curacao and received funds. A few days later, on the 15th December 2008 when the banking transaction had been discovered Mr. Brice promised to pay the funds back by the following day claiming an error in judgment, but could not, knowing that he had made payments to several entities and to himself. The money was repaid shortly after in two payments in January and March 2009.

[34] In the case **The Queen v Lyra Vanterpool-Todman**¹², the defendant was sentenced to 3 years for theft and 2 years for false accounting, effectively stealing \$296,262.94. The defendant was an accounts officer in a Bank and used her position to increase overdrafts on dormant accounts over a two and a half year period. The judge was of the view that the false accounting was done to conceal the theft and ordered the sentences to run concurrently.

[35] In Grenada, there have been a number of cases before the High Court, in which various sentences have been passed for theft and dishonesty offences, including

¹¹ Case from Anguilla; Indictment No.08 of 2015.

¹² No. 17 of 2007 (BVI).

stealing by reason of employment, forgery, fraudulent appropriation by directors, and falsification of minutes. In **The Queen v Terry Hagley**¹³ the defendant was charged with stealing by reason of employment and on a plea was ordered to pay \$20,000.00 compensation into the Registry of the High Court, to do 20 hours of community service and entered a bond to keep the peace.

[36] In the case of **Kelvin Moses**¹⁴, charged with stealing by reason of employment, was sentenced on the 3rd July 2012, after a guilty plea to serve nine months imprisonment and to make compensation in the sum of \$51,962.35 before June 2016, in default he was to serve 9 months imprisonment.

[37] In the case of **R v Yandel Gaston**¹⁵ the defendant pleaded guilty to stealing the sum of \$108,000.00 XCD over a 12-month period from the St Lucia Hospital Industry Credit Union and was a man of previous good character. The Court made a compensation order in the sum stolen and also ordered the defendant to do 200 hours of community service, in default 3 years imprisonment along with keeping the peace and to be of good behavior for 3 years, in breach of which the defendant would have to serve two years imprisonment.

Victim Impact Statement

[38] IAL is one of the largest food distributors in Grenada, the business having been started by the Sylvester Family in 1973. The company moved from being a family run business to one in which another large company Goddard Enterprises Limited (GEL) acquired shares and became part owners. Various heads of the company were spoken with and the consensus seemed to be that the actions of Mr. Mc Sween damaged the reputation of the company, and also that they had lost trust in persons at their warehouse. This lack of trust further resulted in IAL's management investing in tighter security control mechanisms at a financial cost to

¹³ GDAHCR2010/0068.

¹⁴ GDAHCR2010/0094.

¹⁵ Case No 1937 of 2012 (unreported), St Lucia.

them. The morale at IAL remains low up to the present time, and the management's competence has been put in question by their partners GEL and they have lost business from the cigarette company in Trinidad.

[39] IAL wish to be fully compensated for their loss and would like Mr. Mc Sween to pay for his actions.

[40] Mr. Prime stated that although the victim impact statement states that the defendant does not understand the far reaching implications of his actions and that the IAL would wish to have all the monies repaid all at once. Mr. Prime states that the defendant does understand the consequences of his actions and having been employed with the company since 1990 from ground up as a porter over a period of time, he has climbed the ladder and got to the position of supervisor. This says Mr. Prime is an illustration of how well he has done, how hard he worked to progress and an example of his ambitions. Having heard and seen all of counsel's submissions, it is clear that the aggravating factors do outweigh the mitigating factors.

[41] In the case of **Bjarnason**, [2011] Can LII 67010 (MB PC) Moar P.J referring to the case of **R v Saleem** stated:

"Because of the fact that thefts from employers are difficult to detect, because employees have the ability to know the employer's systems and weaknesses, perhaps in the security; they have the ability to exploit those weaknesses for their own benefit, therefore, there is a considerable amount of employee theft in this country that goes undetected."

[42] I do acknowledge that at times a suspended sentence or other penalty outside of a penal institution can be the appropriate sentence to be imposed in cases involving dishonesty with an element of breach of trust or abuse of position. Dishonesty offences and breach of trust are not offences where such a disposition is precluded.

- [43] Considering the background of this defendant it is not difficult to accept that this was certainly offending that was out of his character. There is no doubt that since the crime was detected that the defendant has taken some positive steps to redress certainly supports the conclusion that a suspended sentence would be definitely in his best interests and that of society in the long run. However, sentencing is not entirely about the individual but also involves a consideration of the offences that are before the Court.
- [44] I must consider amongst other things, the fact that the offence occurred over a period of time and involved more than one transaction. It was a well thought out scheme and the losses occasioned were not small.
- [45] I have taken the opportunity to consider the positions of counsel and I have reviewed the applicable law. Based on the facts now before the Court I must conclude that the principles of deterrence and prevention can be dealt with by a non-custodial sentence. I have firmly in mind the other principles of rehabilitation and reformation.
- [46] The aggravating factors point to a serious offence that fortunately came to a stop once the discrepancies had been found out. But for that, there is no reason to believe the losses would have not continued to mount.
- [47] I have considered the effect that this has had on the defendant and also the effects on his family life in particular his three very young children ages 13,10, 3 and his wife who depend on the defendant and believe that the suspended sentence regime was designed for offenders such as this defendant, who commit a very serious offence that appears to be completely out of character and then does as much as possible or offers to remedy that mistake.

[48] In the case of **R v Petherick (Rosie Lee)**¹⁶, the English Court of Appeal considered the effect of sentencing on the rights of an offender's dependent children and other family members under the European Convention on Human Rights 1950 Art. 8 and gave guidance¹⁷. A number of general observations were made:

“(a) the sentencing of a defendant inevitably engaged not only their own Art. 8 family life but also that of their family, including any dependent children; (b) the correct approach in all Art.8 cases was to ask whether there was an interference with family life, whether such interference was in accordance with law and in pursuit of a legitimate aim within Art. 8(2) and whether such an interference was proportionate on a balance of the various factors. That approach was as true of sentencing as of any other kind of case in which family life was in question, HH applied. In sentencing cases, the first two questions would usually be straightforward, it was the third question which might call for careful judgment; ... that dependent children were a relevant factor in sentencing; (d) it followed that a criminal court should be informed about the defendant's domestic circumstances, and where the family life of others, especially children, would be affected, would take it into consideration. The court would ask whether the sentence contemplated was a proportionate way of balancing such effect with the legitimate aims that sentencing had to serve; (e) in a criminal sentencing exercise the legitimate aims which had to be balanced against the effect a sentence often had on the family life of others, included: society's need to punish serious crime; the interest of victims that punishment should constitute just deserts; society's need for appropriate deterrence; and the requirement that there should not be unjustified disparity between defendants convicted of similar crimes. Moreover, children also had a direct interest in society's climate being one of moral accountability for wrongdoing. It was also relevant that a crime

¹⁶ [2012] EWCA Crim 2214; [2013] 1 W.L.R. 1102; 1 Cr. App. R.(S.) 116.

¹⁷ Article 8 deals with the Right to respect for private and family life.

often involved the infringement of other people's family life in addition to the defendant's family R. v Kayani (Talib Hussein) [2011] EWCA Crim. 2871 considered; (f) the balance would be likely to be a fine one where the case stood on the cusp of custody; (g) the likelihood of any interference with family life inherent in a sentence of imprisonment being disproportionate was inevitably progressively reduced the graver the offence; (h) where custody could not proportionately be avoided, the effect on children or other family members might afford grounds for mitigating the sentence length, but also might not. There could be no standard or conventional reduction; it was an infinitely variable factor to be trusted to the judgment of experienced judges..."

The Sentence

[49] The sentence of the Court is as follows:

1. Count 1, Two years imprisonment suspended for two years. This shall be suspended on condition that:
 - a. The Defendant is to repay the sum of \$72,688.50 within 6 months of today's date at 6% interest from the date of sentence until the debt is paid off.
 - b. The payments are to be made at the Supreme Court Registry. In the event of any default the matter is to be brought back to the High Court for the consideration of the suspended sentence being activated immediately.
2. The Defendant is to sign a bond to keep the peace and not commit any further offences within a 3-year period in the sum of \$50,000.00.

[50] The Court wishes to thank counsel for their assistance through their brief and cogent oral submissions.

Shiraz Aziz
High Court Judge

By the Court

Registrar