

**EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

**SAINT LUCIA
CASE NO. SLUCHRD2013/1682**

BETWEEN

THE QUEEN

vs.

MONNALYSSA GEORGE

Appearances

*Mr. Leslie Mondesir of Counsel for the Defendant
Mr. Leon S. France Crown Counsel for the Prosecution*

2016: 14 April, 30 May

Sentencing – Stealing by Reason of Employment – Breach of Trust – Relevance of R v Barrick and the UK Sentencing Guidelines – Persuasive Guidance shaped to fit local circumstances – Offence falling within medium culpability and level two harm – Applications of Principles of Restorative Justice – Promoting Restitution and a sense of accountability and repairing harm caused by offence – Range of low level community order to 36 months applicable – Whether the Defendant should serve custodial sentence.

DECISION

- [1] **RAMDHANI J. (Ag.)** The defendant Monnalyssa George was indicted on the 28th May 2014, for the offence of stealing by reason of employment contrary to section 197(1) of the Criminal Code Cap 3.01 of the 2008 Revised Laws of St. Lucia. On the 1st May 2015, the defendant through counsel sought an indication of sentence pursuant to Practice Direction No. 5 of 2014. Upon a sentencing indication given in writing by the court, the defendant promptly pleaded guilty as charged.

- [2] On that day, the 14th April 2016, all of the material relevant to sentencing was before the court and the parties being ready to proceed, this Court sentenced the defendant. At the time I provided reasons for the sentence in accordance with established principle. I indicated at the time that I would provide a written detailed decision of that sentencing decision. This fulfils that indication.

The Basis of the Plea

- [3] It has been accepted that the defendant was employed as a cashier for over two years with the M & C Home Depot situated at Queen's Lane in Castries. She accepts, by her plea, that between the 6th June 2013 and 30th June 2013, she used her position with the company to steal the sum of EC\$17,192.71.
- [4] The defendant's scheme was rather simple made possible by the trust reposed in her cashier and what it seems she must have considered a loophole in the accounting process. She was simply taking money from the cash after voiding sales on a basis that these goods after sale had been returned to the company when in fact no such goods had been returned. What this meant was that while her cash transactions were being balanced at the end of every day, there were no stock in fact returned for the 'voided sales'. She was discovered after the stock manager caused an investigation to be launched to explain a stock shortage.
- [5] The company, the victim of the crime, is yet to recover any of the sums stolen by the defendant. The company appears to be mostly concerned about recovering their monies. It is accepted that the defendant has been saving towards making full repayment of the stolen sums.

Pre Sentence Report

- [6] At the date of sentencing the defendant of previous good character was presented to this court as a 25 year old female living with her common law partner and eight year old child at Trois Piton, Castries. She has had a good high school education and from her early age she has had to fend for herself and to assist others financially. From early days, she appears to have always been employed at reasonably good jobs. Several of her employers including the victim company spoke well of her general attitude and competence. Members of the community also spoke well of her and expressed considerable surprise about her commission of this offence.
- [7] She and her partner both are working people. They presently live together as a family in an uncompleted house which she and her partner are engaged in completing. According to the pre-sentence report, they share a splendid relationship. She appears to be committed to her family life and raising her son.
- [8] The defendant has sought to explain that she breached her trust because she had been heavily indebted and was trying to pay off these and she was trying to help an aunt who was in need. She has expressed considerable remorse recognizing the shame and distress she has caused her family. She states that she has never told her aunt where she got the money from. She has been saving money to make repayment.

The Relevant Principles on Sentencing

- [9] This offence carries a maximum of 7 years. In arriving at the appropriate sentence in this case, the court must *inter alia* assess the defendant's culpability and the degree of harm caused by the offence. This process requires that the court consider the relevant aims of sentencing, the circumstances of the case, the aggravating and mitigating features of the offence and the offender. See **Desmond Baptiste v R** Criminal Appeal No. 8 of 2003 (and other appeals) SVG.

[10] The Criminal Code Cap 3.01 of St. Lucia to my mind is the starting point for the source of these principles. One of the underlying principles of this Code and reflective of the common law rule is that a court may not impose a custodial sentence on a convicted man unless it is satisfied that such incarceration is required in a given case. Of consideration importance to this case, are those principles relating to deterrence, rehabilitation, reparation and restorative justice contained in the Code.

[11] This theft involves a breach of trust. From the Crown's submissions, and my own research it would seem that generally the courts have treated these types of stealing to be serious meriting the imposition of a custodial term. This has been the effect of the House of Lords decision in **R v Barrick** [1985] 7 Cr App R 142 which has continued to guide regional courts on the relevant matters to be considered on these types of offences. In Barrick the frauds involved amounts ranging from 10,000.00 to 50,000.00. The suggested range was between two to three years imprisonment. The House of Lords in **Barrick** stated that:

"In determining sentence in breach of trust cases, the court should have regard to the following matters – (i) the quality and degree of trust reposed in the offender including his rank; (ii) the period over which the fraud or the thefts have been perpetrated; (iii) the use to which the money or property dishonestly taken was put; (iv) the effect upon the victim; (v) the impact of the offences on the public and public confidence; (vi) the effect upon fellow-employees or partners; (vii) the effect on the offender himself; (viii) his own history; (ix) those matters of mitigation special to himself such as illness; being placed under great strain by excessive responsibility or the like; where, as happens, there has been a long delay, say over two years, between his being confronted with his dishonesty by his professional body or the police and the start of his trial; finally, any help given by him to the police."

The Court ended that reasoning by saying:

"In these cases in general a term of immediate imprisonment is inevitable, save in very exceptional circumstances or where the amount of money obtained is small. The Court should pass a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence."

[12] This decision has generally led regional courts in the past to impose custodial sentences except in a few cases the amounts involved were small or where 'very exceptional circumstances' were found to exist. Today in the United Kingdom, Barrick, which remains

good law, has to be read in context of the current regime found in the 2016 Sentencing Guidelines.

[13] The Barrick's general admonition that 'these cases in general a term of custodial imprisonment is inevitable' is now somewhat tempered by the guidelines; clarity has been given in relation to those cases when a non-custodial sentence would be the proportionate sentence. The guidelines have in part underscored the principles of rehabilitation and restorative justice. Mr. Mondesir has also urged this court to carefully draw on Barrick as he hopes that the court would not impose a custodial sentence on the defendant.

[14] The statutory scheme in St. Lucia requires that a custodial sentence is not to be imposed unless the offence is so serious 'that only such a sentence can be justified for the offence'¹. Significantly, the statutory scheme requires that the court must give considerable regard and weigh to the rehabilitation of the offender and to the general principles of restorative justice. In *R v Proulx* [Sc (Can)] 2000 1 SCR 61 the Supreme Court of Canada stated:

*"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 all 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 / the offender and acknowledgment of the harm done to victims and to the community."*²

[15] For these reasons, it seems to me that Barrick and the present UK guidelines are relevant to the sentencing exercise of this court. The Crown has also asked that I give some consideration to the guidelines. I propose to gratefully use them as a general guide to be adapted to the circumstances of this case and to be modified to fit the context of this jurisdiction.

¹ Section 1096 of the Criminal Code Cap 3.01 St. Lucia.

² The relevance of this consideration could be underscored in a case where a custodial sentence hangs in the balance by the backlog of criminal cases awaiting trial and the facts that the correctional facility is overflowing. See generally *R v Trigger Alan Mike Seed and Philip Stark* [2007] 2 Cr. App. R. (s) 69.

- [16] The UK Guidelines in cases of general theft (in which breach of trust theft cases fall) takes a step by step approach in determining eventual sentence. This is essentially the common law approach to sentencing but requires the consideration of additional statutory factors to determine the final sentence.

Step one requires a determination of the offence category – this requires a determination of the level of culpability of the offender and the degree of harm caused by the offence.

Step two requires the offence category to find the starting point sentence and the range within which it falls. Here aggravating and mitigating features are considered.

Step three requires a consideration certain special factors which might merit a reduction including where relevant whether the defendant gave any assistance to the police.

Step four requires a consideration of any reduction for a guilty plea.

Step five requires the court to consider issues of totality of sentence where relevant.

Step six requires the court to consider consequential and ancillary order.

Step seven requires the court to give reasons for its decision.

Step eight provides for some other statutory deductions where relevant.

- [17] At step one, the court is to categorise the offence by measuring the offender's culpability and the harm caused by the offence. As far as culpability is concerned the court is guided to use certain aggravating factors to determine whether the offence is marked by (A) High Culpability, (B) medium culpability, and (C) lesser culpability.

- [18] Category A - High Culpability cases will involve: (a) a leading role where offending is part of a group activity, (b) involvement of others through coercion, intimidation or exploitation (c) breach of a high degree of trust or responsibility, (d) sophisticated nature of

offence/significant planning, (e) theft involving intimidation or the use or threat of force, (f) deliberately targeting victim on basis of vulnerability.

[19] Category B - Medium culpability cases will be identified by certain features. These have been listed as: (a) a significant role where offending is part of a group activity, (b) some degree of planning involved, (c) breach of some degree of trust or responsibility, (d) all other cases where characteristics for high and lesser culpability are not present.

[20] Category C - Lesser culpability cases will be identified by the following features: (a) performed limited function under direction or involved through coercion, intimidation or exploitation, (b) little or no planning, (c) limited awareness or understanding of offence

[21] The UK Guidelines then go on consider those aggravating features which define the harm which is caused by the offence. Such harm ' is assessed by reference to the financial loss that results from the theft and any significant additional harm suffered by the victim or others – examples of significant additional harm may include but are not limited to: (a) items stolen were of substantial value to the loser – regardless of monetary worth, (b) high level of inconvenience caused to the victim or others, (c) consequential financial harm to victim or others, (d) emotional distress, (e) fear/loss of confidence caused by the crime, (f) risk of or actual injury to persons or damage to property Impact of theft on a business (g) damage to heritage assets, (h) disruption caused to infrastructure.

[22] The harm caused by the offences is also three categories. These are as follows:

Category 1 - Very high value goods stolen (above £100,000) or High value with significant additional harm to the victim or others;

Category 2 - High value goods stolen (£10,000 to £100,000) and no significant additional harm or Medium value with significant additional harm to the victim or others;

Category 3 - Medium value goods stolen (£500 to £10,000) and no significant additional harm or Low value with significant additional harm to the victim or others;

Category 4 - Low value goods stolen (up to £500) and little or no significant additional harm to the victim or others.

In setting out these figures I am mindful of the difference in values in the UK and that in St. Lucia.

- [23] The categories of culpability and harm and then analysed and used to inform sentencing ranges and starting sentences for these general theft offences. The UK Guidelines have established starting points and ranges. These are as follows:

Harm	Culpability A	Culpability B	Culpability C
Category 1 Adjustment should be made for any significant additional harm factors where very high value goods are stolen.	Starting point 3 years 6 months' custody Category range 2 years 6 months' – 6 years' custody	Starting point 2 years' custody Category range 1 – 3 years 6 months' custody	Starting point 1 year's custody Category range 26 weeks' – 2 years' custody
Category 2	Starting point 2 years' custody Category range 1 – 3 years 6 months' custody	Starting point 1 year's custody Category range 26 weeks' – 2 years' custody	Starting point High level community order Category range Low level community order – 36 weeks' custody
Category 3	Starting point 1 year's custody Category range 26 weeks' – 2 years' custody	Starting point High level community order Category range Low level community order – 36 weeks' custody	Starting point Band C fine Category range Band B fine – Low level community order
Category 4	Starting point High level community order Category range Medium level	Starting point Low level community order Category range Band C fine –	Starting point Band B fine Category range Discharge – Band C fine

	community order – 36 weeks' custody	Medium level community order	
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There are several footnotes to the table which speaks *inter alia* to increase sentences for multiple offences.

[24] With the notional ranges and starting points in mind the court is then to consider whether additional aggravating features are involved which is likely to move the sentence upwards within the range, or whether there are mitigating features which will bring the sentence downwards within the range. These additional aggravating features include (some of these are statutory considerations but equally relevant to St. Lucia):

- (i) Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and (b) the time that has elapsed since the conviction
- (ii) Offence committed whilst on bail
- (iii) Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity.
- (iv) Stealing goods to order (resale)
- (v) Steps taken to prevent the victim reporting or obtaining assistance and/or from assisting or supporting the prosecution
- (vi) Offender motivated by intention to cause harm or out of revenge
- (vii) Offence committed over sustained period of time
- (viii) Attempts to conceal/dispose of evidence
- (ix) Failure to comply with current court orders
- (x) Offence committed on licence
- (xi) Blame wrongly placed on others

- (xii) Established evidence of community/wider impact (for issues other than prevalence)

[25] Those mitigating features which may operate to lower the sentence within the range include the following

- (i) No previous convictions or no relevant/recent convictions;
- (ii) Remorse, particularly where evidenced by voluntary reparation to the victim;
- (iii) Good character and/or exemplary conduct
- (iv) Serious medical condition requiring urgent, intensive or long-term treatment
- (v) Age and/or lack of maturity where it affects the responsibility of the offender
- (vi) Mental disorder or learning disability;
- (vii) Sole or primary carer for dependent relatives;
- (viii) Determination and/or demonstration of steps having been taken to address addiction or offending behavior;
- (ix) Inappropriate degree of trust or responsibility

[26] There are also further matters which may affect the ultimate sentence such as whether the defendant may have assisted the prosecution, whether there has been a guilty plea, whether questions of compensation arise. Prevalence is also to be considered; the evidence must show the harm which the offence has caused to the community.³

[27] Before turning to the instant case, I wish to refer to one of the authorities provided to me as part of the Prosecution's guidelines. This is the case of **R v Yandel Gaston** High Court Case No. 1937 of 2012 (unreported) in which the defendant, a man of previous good

³ Note the step by step approach set out above.

character pleaded guilty at the earliest opportunity to a single count of stealing from the St. Lucia Hospital Industry Credit Union the sum of EC\$108,000.00 over a 12 months period. He was sentenced to pay compensation of the amount stolen. He was also placed on probation for three years in which time he was to perform 200 hours of community service, and if he failed to perform such service he was to serve three years imprisonment. He was also ordered to keep the peace and be on good behavior for three years, and he breached this part of the order he would be required to serve a period of two years imprisonment.

The Present Offence

- [28] This offence is marked by a number of aggravating features which I have used first to inform the range and starting sentence. This defendant was placed in some degree of trust in her position of cashier for the company. She breached this position of trust to steal the sums involved. This places the offences in medium culpability range. The sums involved was just over EC\$17000.00. This was not a large sum. Even if one does a straight comparison of the value of money between the UK and St. Lucia this would still fall within category C as being of medium value.⁴ There has been some impact on the business. I consider that the harm caused by this offence falls within category 3 which involves a range starting from a low level community/probation order to 36 months imprisonment. The starting point is a high level community/probation order. Using this starting point I turn to consider the additional aggravating and mitigating features.
- [29] There are no other aggravating features in this case. I do find however, that the defendant has a number of mitigating features. She has no previous conviction and she is previous good character. She has also shown remorse in this matter and the court is informed that she has been saving to payment restitution of the sums involved. I did note that she is a family person with a young child in her care. Had this been a case where she had been on the cusp of a custodial order, these considerations may have likely made disproportionate a custodial sentence which was otherwise proportionate.⁵ This however, is not the case.

⁴ See *Tyack v. The State (Mauritius)* [2006] UKPC 18 (29 March 2006)

⁵ See *R v Petherick (Rosie Lee)* [2013] 1 WLR 1102

- [30] The defendant in this case behaved terribly. There are no good reasons to steal. Her reasons in this case do not help her at all; she could have sought a loan. Further, far from criminal sophistication this defendant has demonstrated her criminal naivety. How could she think that if she was giving refund for goods that were never returned that no one would find out? When did she believe that she would be found out? I note that the accounting system in place made it possible to identify her as the culprit in relation to the unaccounted goods.
- [31] Before I fix the sentence I must say that breach of trust theft cases take a toll on the economic and social health of society. Apart from the direct financial loss caused by these offences, these offences erode the fabric of society. Loss of trust creates an atmosphere of unease for future relationships; businesses are forever affected as employers now view each and every employee with some degree of suspicion. We live in a region where modern security measures are often beyond the reach of small businesses, and most employers depend of loyalty and trust from their employees to make the business viable. When this is lost it has a rippling effect, often not obvious, but we are all affected. Lucky for this business, it had a system in place to discover such frauds.
- [32] I have noted that this defendant has been saving to repay these sums. This will serve to restore the victim. Her voluntary acceptance of responsibility shows her remorse and readiness to be accountable. All of this has led me to conclude this is a case where primacy is to be given to rehabilitation and restorative justice. The order of this Court will address all these stated objectives. In doing so I remind myself of the seriousness of these types of cases.
- [33] A proportionate sentence would not have been an immediate custodial sentence in this case; it is not justified in these circumstances. In starting from a high level community/probation order, making appropriate deductions for her personal mitigations,

and considering her late guilty plea for which she will be allowed some further deduction, I have arrived at the appropriate sentence in this case.

The Sentence

[34] The sentence of the court is as follows:

1. The defendant shall perform 100 hours of community service to the satisfaction of the probation officer and if in breach shall be brought to this Court on warrant for consideration as to whether the term of 9 months imprisonment or a part thereof shall be served immediately.
2. The Defendant shall pay compensation to the virtual complainant in the full amount as stated in the indictment in the following manner: a lump sum payment of EC\$5,000.00 to be paid by the 30th April 2016; balance to be paid in installments of EC\$300.00 to be paid at the end of each month. These sums are to be paid into court. A breach of this term shall result in the Defendant being brought to this Court on warrant for consideration of whether a term of 9 months imprisonment or a part thereof shall be served forthwith.

[35] Before I leave this matter, I would like to express my gratitude to the attorneys, the probations officer and the court staff for facilitating the completion of this matter



Darshan Ramdhani
High Court Judge (Ag.)

