A

ATTORNEY-GENERAL

v.

MITIELI KILA

B

[SUPREME COURT, 1969 (Hammett C.J.), 27th June, 10th October]

Criminal Jurisdiction

Criminal law—practice and procedure—charge containing alternative counts—all counts to be numbered consecutively—practice where alternative counts not proceeded with—Criminal Procedure Code (Cap. 14) s.123(a) (v)—Penal Code (Cap. 11) ss.306(b) (ii), 311(1) (c) (v).

C

Criminal law—sentence—embezzlement—offender placed on probation—whether adequate penalty—Penal Code (Cap. 11) s.306(b) (ii).

Where a charge contains counts which are indicated to be alternative to others, all counts in the charge should nevertheless be numbered consecutively as required by section 123(a) (v) of the Criminal Procedure Code. Where the alternative counts are not proceeded with in view of a conviction or convictions on other counts, it is sufficient for the court to make a statement to that effect.

D

The respondent, a married man with a family, in a period of one month embezzled five sums of money amounting to $118-50 belonging to the Education Deaprtment, by which the respondent was employed as a bursar. Restitution in full was made and the respondent, after eighteen years' service, lost his pension rights. The magistrate placed the respondent on probation and the Attorney-General appealed, contending that the sentence should have been one of imprisonment.

E

Held: Although imprisonment is usually the only appropriate sentence where there has been a breach of trust by an employee, it is not necessarily so in every case. The magistrate was entitled to accept the uncontradicted statement of the respondent's counsel that the respondent would be dismissed from his employment and the sentence, though lenient, was not manifestly inadequate.

F

Cases referred to: *R. v. Bazeley* [1969] Crim.L.R. 207: *R. v. Nabati* (Supreme Court — unreported): *R. v. Rowe* (1902) 20 N.Z.L.R. 590: *R. v. Fowler* (1904) 23 N.Z.L.R. 356.

G

Appeal by the Attorney-General against a sentence for embezzlement imposed in the Magistrate's Court.

G. N. Mishra for the appellant.

Respondent in person.

H

The facts sufficiently appear from the judgment.

HAMMETT C.J.: [10th October 1969]—

The respondent pleaded Guilty in the Court below to each of five counts of Embezzlement contrary to Section 306 (b) (ii) of the Penal Code. After calling for a Probation Officer's report the learned trial Senior Magistrate decided not to impose a sentence of imprisonment but to place the respondent on probation, which he did on each count.

The Crown has appealed against sentence on the following grounds :—

"1. That the said order is wrong in principle and manifestly inadequate having regard to all the circumstances of the case and the nature of the offences committed by the said MITIELI KILA.

2. That the said social enquiry report contained matters that should not be the subject of such a report, in particular, relating to mitigating features of the offence."

I notice that there were in fact 10 counts in the charge in the Court below, only five of which were numbered. The first count averred Embezzlement contrary to Section 306(b) (ii) of the Penal Code of the sum of $18. The next count was not numbered but bore the heading "Alternative Count" and averred Fraudulent Conversion contrary to Section 311 (c) (i) * of the Penal Code of the same sum. The third count was numbered "2nd Count" and likewise was followed by another unnumbered count of Fraudulent Conversion headed "Alternative Count". The remaining six counts were similarly set out in pairs with only one count in each pair being numbered.

This method of setting out charges conflicts with the express statutory requirements of Section 123(a) (v) of the Criminal Procedure Code which reads :—

"Where a charge or information contains more than one count, the counts shall be numbered consecutively."

It may have been thought appropriate to adopt this unusual method of setting out the ten counts in this charge in this case because five of the counts were alternative counts. I would, therefore, draw attention to item 6 in the Second Schedule to the Criminal Procedure Code where specimen charges of Larceny and Receiving are set out as alternative counts but are still nevertheless numbered consecutively as required by Section 123(a) (v). This is not the first time recently that I have seen charges containing more than one count, which have not all been numbered consecutively as is required by Section 123(a) (v). This a practice which can lead, and has in this case led, to some confusion and it should be discontinued.

The record in this case shows that the whole charge, containing ten counts, of which five were numbered and five were not numbered, was read and explained to the accused. When the accused's pleas were taken he pleaded Guilty to each of the counts numbered one to five respectively. Because of this the accused's pleas were not taken to any of the unnumbered counts.

*The reference evidently intended in section 311(i) (c) (i)—Ed.

The record of the finding of the Court was, however, made in the following terms :—

"Finding : Convicted as charged."

This was clearly not intended. There were ten counts in the charge and the accused has only pleaded to the five numbered counts. In view of the accused's pleas to these five numbered counts, his pleas were not in fact taken to the remaining five unnumbered alternative counts.

The intention of the Court below in those circumsstances was clearly only to convict the accused of Embezzlement contrary to the Penal Code, Section 306 (b) (ii), on each of the five counts in the charge numbered 1 to 5 respectively and not to convict him on each of the five alternative unnumbered counts in the charge which averred Fraudulent Conversion of Property contrary to Section 311(c) (i) of the Penal Code. The finding could properly have stated that these unnumbered counts were in the alternative and were not proceeded with, as in fact is the position.

In order to regularise the matter, I do therefore, in exercise of the powers contained in the Criminal Procedure Code, formally substitute for the finding in the Court below the following finding :—

"Finding : Guilty of Embezzlement contrary to Penal Code, Section 306(b) (ii), as charged on each of the counts numbered 1 to 5 respectively.

The remaining five unnumbered counts of Fraudulent Conversion contrary to Penal Code, Section 311(c) (i), are alternative counts and are not proceeded with."

In connection with the second ground of appeal, I was invited to consider giving a ruling concerning certain aspects of Probation Officers' reports for future guidance. In this regard I have spent some time in studying a number of papers on this subject, originating both in this country and in England.

At present there are no rules in Fiji which govern the matter. It appears to me, after considerable thought, that it would be better if the rules that are clearly needed in Fiji should be formulated after discussion with all concerned rather than that I should attempt to deal with the matter piecemeal and ad hoc in this judgment.

I now turn to the first ground of appeal which was argued before me on the basis that where it is proved that an accused person has been guilty of fraud or embezzlement, over a period, a sentence of imprisonment should be imposed, and that, in the absence of some special reasons for not doing so, it is wrong in principle to impose any other sentence upon such an offender than a sentence of imprisonment.

In support of this submission attention was drawn to a recent case in the Supreme Court of Fiji (*R. v. A. Nabati*) in which the accused was convicted on seven counts of fraudulent conversion of sums of money totalling the equivalent of $385 over a period of a little less than four months. In that case the accused was a police officer. The money converted had not, however, come into his possession by virtue of his official position but in his capacity as a trustee as chairman of a school committee. When passing a sentence of 6 months' imprisonment on each count,

to run concurrently, the learned trial Judge declined to accept the suggestion of the accused's counsel that he should be placed on a bond and not sent to prison. He then expressed the view that, in principle, it would not be proper to deal with the accused as his counsel has urged.

Learned Crown Counsel also drew my attention to the cases of *R. v. Rowe* (1902) 20 N.Z.L.R. 590 and *R. v. Fowler* (1904) 23 N.Z.L.R. 356. In these cases it was held that the provisions of "The First Offenders Probation Act 1886" (New Zealand) were not applicable to the case of a prisoner who had embezzled sums of money over a considerable period and had falsified his accounts even though he admitted his defalcations and offered to make restitution.

These authorities are over 60 years old, and views on punishment have changed in that time. There are also material differences between the facts in those cases and those in this case and the 1886 Act and the present law in Fiji.

The first is that the "First Offenders Probation Act 1886 (New Zealand)" did, as its title indicates, only apply to "first offenders". In the cases of *Rowe* and *Fowler* one of the reasons why it was held that that Act was not applicable to their cases was that each was charged with a series of offences committed over a considerable period. It was considered that in respect of all counts after the first count on which they were convicted they were no longer "First Offenders". The New Zealand Judges did not say that probation was inappropriate but that the provisions of the "First Offenders Probation Act" were not applicable to their cases.

My attention was also directed to the case of *R. v. Bazeley* which is referred to in [1969] Criminal Law Review at page 207. The accused was a postman who appealed against a sentence of 2 years' imprisonment in respect of a total of 57 instances of stealing postal packets. His appeal was dismissed. The commentary states that the court has generally been reluctant to order suspension of sentences for offences involving breaches of trust by employees but that this had been done in one recent case.

In this appeal the respondent is a married man, aged 38, with five children, who has 18 years' service as a civil servant. He was employed as a bursar by the Education Department at the Nasinu Training College at the time he committed these offences. In a period of one month between October and November 1968 he embezzled five sums of money amounting to a total of $118.50. These were sums of money paid by students to him in his capacity as bursar. He has made restitution in full.

In deciding to place the respondent on probation the learned trial Senior Magistrate took into account not only the accused's previous good character, as far as his honesty was concerned, but also the fact, according to the respondent's own counsel, that he would be dismissed as a result of his conviction and would thereby suffer the substantial penalty of losing all the pension rights he had gained after 18 years in the civil service.

It is clear that the Court below considered the loss of such pension rights to be a considerable penalty in itself. Having regard to this he felt justified in taking an unusually lenient view of a case where the accused was a first offender as far as his honesty was concerned.

This is a matter that falls within the discretion of a Magistrate. I cannot accept the contention that in taking the view he did he was wrong in principle not to impose a sentence of imprisonment on the accused and that a sentence of imprisonment must necessarily always be passed in such cases, although it is usually the only appropriate sentence that can be passed.

On the question of whether the sentence was manifestly inadequate, it is clear that the sentence was an unusually lenient one. In deciding to place the respondent on probation instead of imposing a sentence of imprisonment the Court below acted on the understanding that the accused would be dismissed from the civil service, as his counsel assured the Court would be the case.

It does seem to me that the learned trial Senior Magistrate was justified in accepting the uncontradicted assertion of the accused's own counsel that the accused would be dismissed and that that was a factor he could properly take into account in deciding how to deal with him. On that basis I do not consider that the sentence was so lenient as to be manifestly inadequate. It was a lenient sentence and intended as a lenient sentence but it was imposed after full consideration of all the circumstances. I feel the respondent has cause to feel fortunate that such leniency has been extended to him and I appreciate that another court may well have felt unable to take such a merciful view. I have given the matter considerable thought but I do not consider that this is a case where, on the assumption that the accused will in fact suffer the penalty of dismissal, the Supreme Court should interefere.

The appeal is dismissed.

Appeal dismissed.