

STATE v MAHENDRA PRASAD

HIGH COURT — CRIMINAL JURISDICTION

5 GATES J

6, 24, 30 October 2003

[2003] FJHC 320

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Criminal law — sentencing — Larceny by Servant — plea of guilty — reparation made — genuine remorse — previous good character — police assistance not yet given recognition — breach of trust — suspended sentence — Penal Code (Cap 17) s 274(a)(i).

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Accused was employed as a clerical officer handling duties involving preparation of cheques and banking. He was charged of 12 counts of Larceny by Servant and was convicted. He pleaded guilty. The court considered the mitigating factors that the Accused pleaded guilty, repaid the moneys, his genuine remorse and his previous good character. The only aggravating factor was the breach of trust with his employer.

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Held — The Accused was sentenced on each of the 12 counts to a term of 2 years' imprisonment concurrent to each other, each term being suspended for a period of 3 years because of his guilty plea, previous good character and assistance to police. However, his commitment to assist the police further cannot yet be given recognition. In these circumstances, where the remorse was demonstrated to be genuine both to the Complainant and to the court, with full and early reparation made without the need for a court to make a compensation order, the inevitable imposition of a term of imprisonment can sometimes be mitigated by an order suspending such term.

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Sentence suspended to 3 years.

Cases referred to

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Albiston [1 November 74, 1875/C/74]; *Barrick* (1985) 81 Crim App R 78; *Panniker v State* HAA 28 of 2000S; *State v Isimeli Drodroveivali* HAC 9 of 2002S, considered.

Inwood (1974) 60 Crim App R 70; *State v Rusiate Silimaibau* HAA 55 of 1997S, cited.

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B. Solanki and *D. Toganivalu* for the State.

A. K. Singh for the Accused.

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[1] **Gates J.** The Accused has pleaded guilty to 12 counts in the information, all of which charged Larceny by Servant contrary to s 274(a)(i) of the Penal Code (Cap 17). The conduct covered a period of 10 months between 6 August 1999 and 23 June 2000. The total amount accepted as stolen over this period is a little over F\$59,000.

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[2] The offences are felonies and carry a maximum sentence of 14 years' imprisonment.

[3] The Accused was employed by Datec Fiji Ltd during the relevant period as a clerical officer. Among his duties was the preparation of cheques for the payment of overseas suppliers. He also handled banking.

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[4] A consideration of the circumstances of count 1 will illustrate the type of activity involved. On 3 August 1999 the Accused prepared a Datec cheque drawn on Westpac and made in favour of Westpac. The cheque was made up for the sum

of \$5384.17 to cover a draft to pay their overseas supplier. The cheque was then indorsed "Please pay cash". The Accused went to the bank with the cheque and obtained payment in cash.

5 [5] The Accused has said he did not make that indorsement, the "Please pay cash". He implicates the then financial controller in this business. In his interview with the investigating officer on 18 May 2001, he said he gave \$3,500 from this transaction to the financial controller. He explained that first he deposited the cash into three different accounts in his own name, only later taking out \$3500

10 of the \$5000 or so and giving it to the financial controller.
[6] For the purposes of this case the prosecution accepts the story as related by the Accused. Whether the prosecution proceeds against the other person alleged to be implicated is a matter for the prosecution and the investigation authorities. The managing director said in evidence that in each case payment had already
15 been made to the supplier so that these payments constituted repeat payments.

[7] This conduct went undetected for a substantial period before a report was made to the police in February 2001. The delay in detection could point both to there being another person involved as the Accused claims, as well as to the lack of vigilant external audit. Neither the fact that systems might have been slack, or
20 that the crimes were easy to commit undetected, can be regarded as mitigating factors.

[8] The other 11 counts were committed in similar ways to count 1. The Accused used the moneys obtained to reduce his car loan account, to assist with
25 other commitments such as house mortgage payments, USP fees, and for general expenses. The Accused made a clean breast of his wrongdoing to the police. He claimed he was acting under the instructions of the then financial controller. In his interview he said he did not report the matter for fear of losing his job. At first when this case came to court, it was to be a trial though most of the evidence was
30 to be agreed. I will approach the case therefore on the basis that this is not a case of a last minute plea of guilty for which no discount in sentence would have been merited.

[9] Prosecuting counsel informs me that the Accused cooperated with the police and that he is willing to assist them further with their investigations into
35 the other person implicated.

[10] The defence have handed up a settlement agreement dated 24 April 2003 between the Accused and Datec. The agreement records the Accused's acknowledgment of his unlawful taking of funds belonging to Datec. He agreed
40 to transfer his house and his car to Datec to satisfy the loss of these funds to the extent of F\$80,000. The Complainant agreed not to lay criminal charges and the Accused agreed to assist as a key witness to prosecute the other named person, who had migrated after these transactions.

[11] The decision as to whether the Accused was to be prosecuted was not
45 however within the power of Datec to deliver. It was a matter solely for the Director of Public Prosecutions. Though F\$80,000 worth of property has been transferred to Datec, the agreement refers merely to the Accused's acknowledgement of the unlawful taking of funds without naming a specific figure. I am concerned therefore with the pleas of guilty only to the actual figures
50 of stealing as in the information, and I proceed to sentence on the basis of a total taking by the Accused of F\$59,000, not F\$80,000.

Mitigation

[12] The defence called two witnesses in mitigation. Mr Krishna Sami, Datec's managing director, confirmed the making of the agreement. He said "We will be repaid pretty close to all our losses". He added "we were not going to proceed with the case. He has tried his best to pay". Datec wrote to the DPP asking the DPP to withdraw the charges. Indeed not only did Datec's general manager write in such terms, but Datec caused its solicitors to write also.

[13] The solicitors referred to the need for a second chance, that the Accused had learnt his lesson, had suffered the humiliation of loss of his job, and that he was a young man and had a young family.

[14] On 27 May 2003 the managing director wrote again to the DPP stating the Accused had by then secured a new job. Mr Sami said "furthermore, he genuinely seems to repent the mistake he did and being a young person any conviction may have detrimental effect on his career and his family life". None the less the director's decision to continue with the case was well within correct principles and an honouring of the lonely duties of that constitutional office.

[15] A former financial controller and administration manager for Datec, not in any way implicated I should make clear, also gave character evidence for the Accused. He considered the Accused to have done exceptionally well in his work with Datec and said he still maintained a mentoring relationship with the Accused. He regarded the Accused as a punctual hardworking and obedient type of employee who was well regarded.

[16] There are several significant mitigating factors here. The Accused's comparative youth, (25 at the time, he is 29 now), his previous good character and clean police record; he is settled and married and has a young daughter; he is pursuing university studies with a third of his degree still to be completed; he has pleaded guilty, and he has made a complete reparation to the employer for the monies taken, he is said to have "lost everything" in making such compensation. He was fairly lowly in the hierarchy and may have been under the influence of a superior. Importantly his employers speak on his behalf and speak of what they see as his genuine repentance. Lastly, his doctor says he has been an asthmatic for 20 years, is on medication, though his condition is usually manageable.

[17] I bear in mind that the Accused has not only repaid the money which he himself had used but also the money which he says he handed on to the other person. Mr Singh goes further. He says the extra money repaid in compensation, a sum which comes to F\$20,000 or so, is in the nature of a voluntary fine since the Accused has paid, over and above, the losses set out in the information.

[18] This is commendable. But courts have to be cautious to ensure that Accused persons are not allowed to buy their way out of the consequences of crime: *Inwood* (1974) 60 Crim App Rep 70; *State v Silimaibau* (unreported) Suva High Court Crim App HAA0055.1997S; 8 October 1997. In this case I conclude the Accused has not repaid these moneys simply to avoid such consequences. I accept Mr Sami's evidence in this regard.

45 Aggravating factors

[19] The aggravating factors appear to be the large amount of moneys stolen, the longish period over which the dishonesty was practised, and the fact that the offences represented a breach of trust by the Accused towards his employer.

[20] D A Thomas in his 2nd ed of *The Principles of Sentencing* referred [at 153] to the case of *Cunningham* [21.4.75, 3561/03/74]. The Appellant in that case admitted 22 offences involving the misappropriation of about £13,000 belonging

to his employers. This sum was roughly equivalent to F\$40,000. The English Court of Appeal observed that while precise figures were not critical, it was essential “to place the offences in the right perspective within offences of this type”. This was not a case of a man defrauding his employer of hundreds of thousands of pounds but it could not be equated with that of a man who appropriated a few hundred pounds [perhaps equivalent to F\$1000]. The case accordingly fell within the middle range.

[21] The Court of Appeal reduced his sentence from 6 years to 3 years imprisonment holding such a term to be appropriate for the middle range. This level of sentence Thomas considered to be borne out by many comparable cases.

[22] In *Albiston* [1.11.74, 1875/C/74] five men, all of previous good character, were each sentenced to 3 years’ imprisonment for conspiring to steal tyres from their employer over a period of just over a year, the goods being worth about £14,000 [equivalent to F\$42,000].

[23] In *State v Isimeli Drodroveivali* (unreported) Suva High Court Crim Case No HAC007.2002S; 3rd June 2003, Jiten Singh J sentenced the Accused to 3 years’ imprisonment. The Accused was convicted on five counts of conversion. He had worked for a bank and siphoned out \$36,858 from the Complainant’s account over a similar period as here, namely 10 months. The Accused was a first offender, married with children, who lost his employment as a result. But the court found it could not overlook the serious breach of trust in that case.

[24] In *Barrick* (1985) 81 Crim App Rep 78 the Lord Chief Justice of England Lord Lane CJ gave a guideline judgment on appropriate sentences in cases involving breach of trust. The Accused was a person of good character, with no previous convictions. He was aged 41 and had served as a police officer, making a term of imprisonment in the words of the Court of Appeal as “likely to be extremely deleterious and unpleasant for a person of this sort”.

[25] The court said it was “dangerous to generalise where the circumstances of the offender and the offence may vary so widely from case to case”. The court continued at 81:

In general a term of immediate imprisonment is inevitable, save in very exceptional circumstances or where the amount of money obtained is small.

[26] The court confirmed a tariff of between 2–3 years’ imprisonment for the medium range offences here where sums of between £10,000 [F\$30,000] to £50,000 [F\$150,000] were involved. It would not be usual to suspend the sentence in cases of serious breach of trust. A sentence of 2 years’ immediate imprisonment was upheld.

[27] The court referred to the following determinative factors to which a sentencing court should have regard:

- (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 on 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 sometimes 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.

5 [28] Barrick was cited extensively by Pathik J in *Panniker v State* (unreported) Suva High Court Crim App No HAA0028 of 2000S; 15 May 2000. In that case the appellant had his sentence of three-and-a-half years imprisonment for Larceny by Servant reduced to 3 years. The Appellant had stolen F\$49,000 from his employer during the course of a similar period of 10 months.

10 [29] There had been a last minute plea of guilty in the Magistrates Court. Only at the appeal hearing was any money repaid by way of reparation. Pathik J said (at 6):

There is no doubt that an immediate custodial sentence was warranted with no restitution having been made before sentence as the learned Magistrate has said.

15 [30] I consider the starting point for this medium range offence is 3 years' imprisonment. A deduction of a year is to be made from that sentence because of the Accused's plea of guilty, his previous good character, and his assistance to police. His commitment to assist the police further cannot yet be given recognition.

20 [31] The public interest lies in the deterrence of dishonest practices by employees. Usually in such cases the gravity of the breach of trust needs to be marked by an immediate term of imprisonment no matter how sad the Accused's story, or how compelling the mitigation in his favour.

25 [32] But I believe this case falls into that rare category where exceptional circumstances exist. Such were foreshadowed by the court in *Barrick* (at 81). In *Barrick* the court had said of the Accused's offence:

The money was stolen from private individuals who could ill-afford the loss. They were, in short, mean offences. He gave no help to the police.

30 Additionally the case was contested over a 9-day trial. None of these adverse factors apply to the present case.

35 [33] Unlike in *Panniker*, the Accused before me today had already volunteered, without pressure, a full restoration of the Complainant employer's loss. This compensation was paid months in advance of the sentencing process. The employer was well satisfied by this reparation and testified in court to the genuineness of the remorse shown by the Accused.

40 [34] In these circumstances, where the remorse is demonstrated to be genuine both to the Complainant and to the court, with full and early reparation made without the need for a court to make a compensation order, the inevitable imposition of a term of imprisonment can sometimes be mitigated by an order suspending such term.

[35] It is most likely that you will not appear again as an Accused in a criminal court and be convicted of dishonesty. But if you do, you will well understand that none of today's mitigation will apply and no mercy could be extended to you.

45 [36] In the result, you are sentenced on each of the 12 counts to a term of 2 years' imprisonment concurrent to each other, each term being suspended for a period of 3 years. I shall now explain to you what that sentence means.

Sentence suspended to 3 years.