IN THE CAYMAN ISLANDS COURT OF APPEAL

CACR004/2013
Criminal Appeal No 4/2013
Ind 78/10
C#05546/2010

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

Derrick Anthony Thomas

Appellant

The Right Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Hon Ian Forte, Justice of Appeal

Mr Ben Tonner of Samson & McGrath appeared for the Appellant
Ms Michael Snape instructed by the Director of Public Prosecutions appeared for the Crown

Hearing: 15 July 2013
Transcript released: 2 September 2013

JUDGMENT

Revised from transcript and Approved

Sir John Chadwick, President:

1. In December 2012 the appellant, Derrick Anthony Thomas, pleaded guilty to five of sixteen counts on which he had been indicted. The matter was stood over for sentence following a social enquiry report. He was sentenced by Justice Quin on 16 April to a total of four and a half years imprisonment. He now appeals from that sentence.

2. The offences to which the appellant pleaded guilty - and on which he was sentenced – were, first, obtaining services by deception (count 1); and second, theft (counts 3, 7, 11 and 14).The circumstances in which those offences were committed were that the appellant had commenced business offering services in connection with the installation of geo-thermal equipment for use in the air conditioning of buildings. In April 2009, in the promotion of that business, the appellant instructed the Cayman Free Press to advertise his services. He purported to pay for that advertisement with personal cheques, drawn on his own account. Those cheques were not honoured. The dishonoured cheques were the subject of the first count to which he pleaded guilty. On a number of occasions over the next nine months – specifically in June, July, September and December 2009 - he persuaded clients to part with sums of money by way of deposit for the installation of geo-thermal equipment at their premises. Those sums ranged in amount from CI$13,330 up to CI$ 29,275: in aggregate CI$99,600.60. The business did not prosper; and the promised installations were not carried out. The payments made to the appellant for services which he did not provide were the subject of the theft charges to which he pleaded guilty.

3. The guilty pleas were entered on the morning of the trial. In the course of his submissions before sentence, counsel then appearing for the appellant described the circumstances to the judge in these terms:

> "As a businessman he [the appellant] was a complete disaster. He went on and went and spoke to other people. Further monies were taken to try and in a sense get something done but nothing ever did get done and so he clearly was using monies for his own purposes in a sense because each of the contracts the individuals paid money, the money was not being used to fund their contract, to fund their job, it was being used then on the face of it to try and help the next job and then the next job and as I say instead of calling a halt and saying 'look' and realising 'I'm in problems, in big trouble with this', he kept on going, and obviously at that point he was well aware, whether he liked it or not or wants to put it to the side or whatever, he was well aware at that point that he was not able to do what he had been contracted to do. He continued to go and obtain funds and obtaining funds that were not going to be used for the business. As a result, he is now faced with these various charges to which he has properly entered his pleas. He can't simply sit back and claim that overall he just was the ineffective businessman that he certainly was. But as I say, he should have put a stop to it".

That was the basis upon which the matter was explained to the judge and upon which he was invited to pass sentence in respect of the four counts of theft and the count of obtaining services by deception.

4. As presented to the judge, as sentencer, this was not a case in which it was said that the appellant set out with a deliberate intention of defrauding customers through a dishonest business: rather it was a case in which a business which the appellant was ill-equipped to carry on failed. The appellant was unable to pay his bills or to honour his commitments; but he continued to take money from clients knowing that his company was not going to provide the installations for which they had contracted and paid. Instead of calling a halt when he could see that failure was inevitable, he went on trading in the knowledge that failure was inevitable. It is feature which is the basis for the charge involving dishonesty; and the guilty plea to that charge.

5. The judge was invited to approach his task on the basis that he was sentencing an offender who was in a position of trust in relation to the person from whom the money had been stolen; and to follow the well-known guidelines in the English cases of *R v Barrick* (1985) 81 Crim App R 78 and *R v Clarke* [1998] 2 Crim App R (S) 95. Those were cases of a more traditional breach of trust falling within the description given by Lord Lane, Chief Justice, in *Barrick* (*ibid*, at page 81):

> "The type of case with which we are concerned is where a person is in a position of trust for example an accountant, solicitor, bank employee or postman and has used that privileged and trusted position to defraud his partners or clients or employers or the general public of sizeable sums of money."

In the present case, the appellant has defrauded his clients of sizeable sums of money; but those who have been so defrauded are not within the traditional category of persons in relation to whom the offender can be said to been in a position of trust. It may, perhaps, be said that a member of the public who contracts for work to be done on the basis that he will pay a sum of money in advance, whether described as a deposit or money on account, expects that the contract will be carried out (and, in that sense, trusts the person with whom he has contracted); but it is difficult to say that the trader to whom money is paid in advance – and who fails to perform under the contract – is, in substance, abusing a privileged and trusted position.

6. Having referred to the cases of *Barrick* and *Clarke*, the judge reached the conclusion that the starting point for the offences of theft should be imprisonment for a term of five years. He allowed a reduction of 20 percent in consideration of the guilty plea: albeit a plea entered at the last minute. That led him to impose sentences of four years' imprisonment in respect of each of the four counts of theft. He directed that those

sentences should be served concurrently. He imposed a separate sentence of six months in respect of the first count - obtaining services by deception - which he directed should be served consecutively. The four concurrent sentences on the theft counts and the consecutive sentence on the first count amounted, together, to an overall term of four and a half years.

7. This appeal is advanced on the basis that five years was too high a starting point for the theft counts. We were referred to the Chief Justice's statement on tariffs and guidelines for sentencing offences issued on 16 January 2002. In the section headed "Offences of Dishonesty" there is the following statement:

> "For offences of theft or related offences, depending on the value of the property stolen and any other aggravating factors, particularly where there is a breach of trust in the context of a relationship of employment, an immediate term of imprisonment ranging from one to four years for a first offence and an order for repayment will likely be imposed. The tariff could be higher still depending on the seriousness of the offence".

8. In the present case these were not first offences. The appellant had been convicted of offences of obtaining property by deception in 1998. He was then sentenced to three months' imprisonment suspended for two years. There were, on that occasion, six separate offences all of a comparatively small amount. He was convicted some 14 months later on two counts of obtaining property by deception; in respect of which he was sentenced respectively to six months' imprisonment and nine months' imprisonment with the suspended sentence activated. So some 14 or 15 years ago he was sentenced to terms of imprisonment in respect of various offences of dishonesty not dissimilar in nature – that is to say, offences of dishonesty involving the obtaining of property by deception - to which he has pleaded guilty on this occasion. That would tend to bring the starting point into a somewhat higher range than the one to four years indicated in the Chief Justice's Guidelines.

9. Nevertheless, it is appropriate to have in mind the indication given by the Court of Appeal of England and Wales in *Clarke*. After reviewing the authorities, including *Barrick*, the Court said this:

> "In the light of all these considerations we make the following suggestions. We stress that they are by way of guidelines only and that many factors other than the amount involved may affect sentence. Where the amount is not small but is less than £7,500 pounds, terms of imprisonment from the very short up to 21 months will be appropriate. Cases involving sums between £7,500

> pounds and £100,000 pounds will merit two to three years. Cases involving sums between £100,000 pounds and £250,000 pounds will merit three to four years. Cases involving between £250,000 pounds and a million pounds will merit between five and nine years. Cases involving a million pounds or more will merit ten years or more. These terms are appropriate for contested cases. Pleas of guilty will attract an appropriate discount. Where the sums involved are exceptionally large and not stolen on a single occasion or the dishonesty is directed at more than one victim . . . , consecutive sentences may be called for."

10. Those guidelines were issued in the Court of Appeal in England and Wales in 1997 in relation to what may be described as the more traditional "breach of trust" cases: that is to say, cases where the offender has abused a position of trust. Typical examples are an employee stealing from his employer or a solicitor stealing from his client. As I have said, the present case did not really fall into that category. In so far as this can be described as a case involving a breach of trust at all, the trust is that which arises under a commercial contract in which a person who is paying in advance for goods or services expects that those goods or services will actually be provided. In the scale of trust relationships, that seems to us different in nature from the trust which arises in solicitor/client cases or employee/employer cases. We would not expect the sentence in a case of this nature to exceed the sentence that would be appropriate in a more traditional breach of trust case.

11. The guidelines issued by the Court of Appeal in England and Wales in *R v Clarke,* indicate that, in that jurisdiction, an appropriate sentence in a case of this nature, after a trial, would not normally fall outside the two to three year bracket. In making that observation I have in mind first that the monetary bands referred to in the *Clarke* guidelines need adjustment, first, to take account of the inflation that has occurred between 1997 and the present date and, second, to have regard to the currency difference between the Cayman Island dollars and the pound sterling. Those factors were discussed by this Court in its judgment in *R v Schultz* (CICA (Crim) 27/2012, unreported, 24 April 2013); where it was pointed out that, although no precise calculations are appropriate, it is relevant to have in mind that *Clarke* was a decided some 15 years or more ago, and that the monetary bands in *Clarke* are, of course, in pounds sterling.

12. The aggravating factor in this case is that there has been a previous history of dishonesty in a similar context; although it can be said in favour of the appellant that

that was some years ago. Since then the only offence of dishonesty of which he has been convicted has been that of dishonestly obtaining of a passport by false representations: an offence of the appellant was convicted in 2004 and ordered to pay a fine of CI$500 or serve 30 days' imprisonment. So until the present series of offences in 2009, it can be said that the appellant had, for the most part, managed to keep out of trouble.

13. But these were offences committed against a number of members of the public involving comparatively substantial sums of money - some CI$20,000 to CI$30,000 in each case - over a period of some six to nine months. Had this been a case which had gone to trial, we would have taken the view that a starting point of two and a half to three years was appropriate in relation to the theft offences. We have found little or no explanation in the ruling on sentence as to the considerations which led the judge to the conclusion that five years was an appropriate starting point in this case.

14. In mitigation it is said, correctly, that there was a guilty plea - albeit, at a very late stage after a series of not guilty pleas - and that the appellant's personal circumstances were such as to lead to a favourable social enquiry report recommending a suspended sentence and probation.

15. Taking account of the mitigating factors and applying them to a starting point of between two and a half and three years, we would have reached the conclusion that 27 months for each of the theft offences was the right sentence. Four years, as it seems to us, is manifestly too high.

16. There is, then, the separate sentence for obtaining services by deception. It is accepted, on behalf of the appellant, that the judge was entitled to take the view that that offence merited a consecutive sentence rather than a concurrent sentence. Although the advertisement was in connection with the same business as that in the course of which the thefts were committed, the appellant was not charged with dishonestly uttering an advertisement: the charge was dishonestly obtaining the services of the Cayman Free Press in running the advertisement in circumstances where he had issued cheques in advance which were not honoured. Other sentencers might have taken the view that the whole (including placing the advertisement) could be looked at as a single dishonest course of conduct - so that the sentences would be served concurrently - but

Justice Quin did not take that view; and, as I have said, it is accepted on behalf of the appellant that he was entitled to treat the offence under count 1 as sufficiently distinct to merit a consecutive sentence. Nevertheless, he was required to look at the totality of the sentence that he was passing - that is to say, the totality of the terms to be served in relation to the thefts and the terms to be served in relation to count 1 - and he needed to ask himself whether the sentence in relation to count 1 was proportionate to the sentences passed in relation to the theft. In carrying out that exercise, he should, we think, have reached the conclusion that six months for the offence under count 1 was too high; and that the appropriate sentence was three months' imprisonment for that offence.

17. Accordingly, we would allow the appeal, set aside the sentences that were passed and, in place of those sentences, impose sentences of 27 months on each of the four theft charges to be served concurrently and a sentence of three months on count 1 to be served consecutively; leading to an aggregate sentence of 30 months by way of reduction to the four and a half years which the judge imposed. The time that the appellant has spent in custody since he was sentenced in April 2013 is to be taken into account; so that the sentences which this Court imposes are to be treated as having commenced on the day the appellant was sentenced by Justice Quin.