

8-12-06

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS**

**Criminal Appeal No. 18 of 2006  
(Indictment No. 12/06)**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**Appellant**

**- AND -**

**CAROL MARIE SCOTT**

**Respondent**

**Criminal Appeal No. 24 of 2006  
(Indictment No. 28/03)**

**BETWEEN:**

**KEVIN FYNE**

**Appellant**

**- AND -**

**HER MAJESTY THE QUEEN**

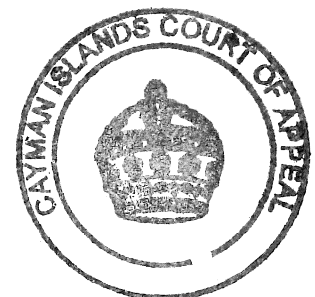
**Respondent**

**BEFORE:**

**THE RIGHT HON. MR. JUSTICE ZACCA, P.  
THE HON. MR. JUSTICE TAYLOR, J.A.  
THE HON. MR. JUSTICE FORTE, J.A.**

Appearances :

**R v Scott:** For appellant: Kirsty-Ann Gunn, Crown Counsel.  
For respondent: John Furniss of Keith Collins & Co.  
**Fyne v R** For appellant: James Austin-Smith of Walkers.  
For respondent: Kirsty-Ann Gunn, Crown Counsel.



**Heard:** 22<sup>nd</sup> November 2006

**Judgment delivered:** 8<sup>th</sup> December 2006  
**Reasons released:** 23<sup>rd</sup> April, 2007

**REASONS FOR JUDGMENT**

**PRESIDENT:**

These two appeals raise the question as to what is the appropriate sentence to be imposed on convictions for breach of trust involving theft and false accounting by employees. These cases provides us with an opportunity to

make some observations upon the proper sentence to be passed in respect of certain types of theft.

The respondent Scott was charged with thirteen counts of theft of a total amount of C.I.\$26,492.22. She was also charged with corresponding counts of False Accounting. The offences were committed over a thirteen month period, from December 2003 to December 2004.

She was employed by Professional Immigration Services to process payments and application forms received from clients instructing the Professional Immigration Services to process their applications for work permits in the Cayman Islands.

She pleaded guilty to all counts on June 16, 2006 and on September 4, 2006, the Chief Justice sentenced her to two years imprisonment suspended for two years and a community service order for 150 hours. The respondent was also ordered to pay C.I.\$30,000.00 in compensation or serve 30 days imprisonment in default of payment. The Crown has appealed against the sentence imposed by the Chief Justice.

The respondent was convicted after trial in 1998 for offences of theft and false accounting arising out of her employment with another company. The amount involved was C.I.\$16,457.85. She was sentenced to 18 months imprisonment for theft and a further term of 6 months imprisonment for false accounting was suspended for two years. She was also ordered to pay compensation in the amount of C.I.\$16,457.85 or 6 months in default. On

appeal, 9 months of the 18 months on the charges of theft was suspended for 2 years.

The appellant Fyne pleaded guilty on August 20, 2004 to several counts of theft and false accounting involving approximately \$30,000.00. The offences were committed between the period December 1997 and January 1999. He was sentenced on October 23, 2006 to 6 months imprisonment on each count to run concurrently. He has appealed against the sentence.

The guidelines for sentencing for breach of trust cases involving theft and false accounting is set out in **R v Barrick** (1985) 81 Cr. App. R.78. In this case the amount involved was approximately £9000 over a period of 21 months. He was sentenced to two years imprisonment after a conviction. At page 81-2, the Lord Chief Justice said:-

"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, terms of imprisonment ranging from the very short up to about 18 months are appropriate. Cases involving sums of between £10,000 and £50,000 will

merit a term of about two to three years imprisonment”.

And again at page 82:-

“The terms suggested are appropriate where the case is contested. In any case where a plea of guilty is entered however, the court should give the appropriate discount. It will not usually be appropriate in cases of serious breach of trust to suspend any part of the sentence. As already indicated, the circumstances of cases will vary almost infinitely”.

And later (at p. 82):-

“The following are some of the matters to which the court will no doubt wish to pay regard in determining what the proper level of sentence should be:

(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 in 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”.

In *McLaughlin v the Crown*, Cayman Islands Court of Appeal judgment on December 6, 1995, the court cited *Barrick* with approval, in upholding a sentence of two years imprisonment of which 15 months was suspended, in the case of a breach of trust by a trust company employee who stole \$7,622.

In imposing the sentence the trial judge stated that he wished to send out the message that employees who breached that trust must, save in the most exceptional and compassionate circumstances, expect an immediate prison sentence.

In *Regina v Trevor Clarke* (1998) 2 Cr. App. R 137, a Court of Appeal decision, Rose J cited *Barrick* with approval.

Before us, it was suggested that the principle laid down in *Barrick* was to some extent modified by the Court of Appeal in *R v Kefford* (2002) 2 Cr. App. R. (5) 106. In that case a sentence of 12 months imprisonment had been imposed on a building society employee who pleaded guilty to charges of theft and false accounting involving £11,120. On appeal the sentence was reduced to four months imprisonment.

The then Chief Justice, Lord Woolf made reference to the over crowding of prisons in the United Kingdom. Lord Woolf at paragraph 10 said:

“In the case of economic crimes, for example obtaining undue credit by fraud, prison is not necessarily the only appropriate form of punishment. Certainly, having to perform a form of community punishment can be a very salutary way of making it clear that crime does not pay, particularly if a community punishment order is combined with a

curfew order. In the appropriate cases, it can be better that an offender repays his debt to society by performing some useful task for the public than spending a short term in prison”.

The above remarks were addressed to punishment for such economic crimes as obtaining credit by fraud but not to a breach of trust case. This is borne out by the following passage at paragraph 16 where Lord Woolf said:

“The sentencing judge, H.H. Judge Burford Q.C., in his sentencing remarks made it clear that he was giving the appellant credit in relation to all the mitigating features of the case. He indicated that he was adopting the guidance given in this court in *Clarke* (1998) 2 Cr. App R (S) 95. In that case Rose V. P., in giving the judgment of the court, updated the guidelines in *Barrick* (1985) 81 Cr. App. R 78 and indicated that in theft involving breach of trust, the appropriate sentence, where the amount was not small but was less than £17,500, terms of imprisonment for very short up to 21 months would be appropriate. Even in the present circumstances in cases involving breach of trust where the sum involved is not small this guidance is still applicable even where it is a first offence. However, the guidance in the *Bibi* line of decisions is still highly relevant in relation to making the sentence no longer than is necessary”.

The court in *Kefford* did not criticize the principle that in cases of breach of trust, even for a first offence, a sentence of immediate imprisonment was appropriate. What the court did was to reduce the sentence to one of four months after taking all the mitigating factors into consideration.

In fact in *R v Timothy John Crook* (2003) 2 Cr. App. R (S) 49, a Court of Appeal decision, at paragraph 9, Stanley Burnton J. said:

“It is suggested by Mr. Harrison that the starting point of the judge must have been one of four years, which was discounted by 25 per cent to take account the

guilty plea. That starting point was itself one which complied with the Clark/Barrick guidelines. Mr. Harrison submits, however, that those guidelines must be regarded as modified in the light of Kefford. The difficulty with that submission is that in para. (16) of the Judgment of the Court of Appeal in Kefford, those guidelines were expressly referred to in terms which made it clear that they were still applicable”.

On January 16, 2002, certain guidelines on sentencing were promulgated by the Chief Justice as it related to the Cayman Islands.

“For offences of theft or related offences, depending on the value of the property and any other aggravating factors, particularly where this is a breach of trust in the context of a relationship of employment, an immediate term of imprisonment ranging from 1 to 4 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”.

The Chief Justice stated that the setting of tariffs for sentencing are not cast in stone but to advise everyone on what the guidelines and likely consequences will be.

This court reaffirms its adoption of the guideline on sentencing in **Barrick** and the cases which followed **Barrick**, in cases of theft involving a breach of trust.

Even for a first offence the appropriate sentence is one of immediate imprisonment unless exceptional circumstances are shown. The length of imprisonment will vary in each case depending on the mitigating and aggravating factors.

In light of the economy of the Cayman Islands, the sentence imposed by the court in cases of theft, involving breach of trust, should be one which would act as an effective deterrent.

The court now turns to consider what are “exceptional circumstances”.

In *R v Kelly* (1999) 2 Cr. App. R (S) 176 the term “exceptional circumstances” was considered by the Court of Appeal in relation to s 2 of the Crime (sentences) Act 1997 which provides :

(2) The Court shall impose a life sentence, that is to say –

(a) where the person is 21 or over, a sentence  
of imprisonment for life;

(b) where he is under 21, a sentence of custody  
for life under s 8 (2) of the Criminal Justices Act 1982.

Unless the court is of the opinion that there are exceptional circumstances relating to either of the offences or to the offender which justify it not being so.

The Chief Justice (as he then was) at page 182 said:

“We must construe “exceptional” as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered. To relieve the court of its duty to impose a life sentence under s. 2, however, circumstances must not only be exceptional but such as, in the opinion of the court, justify it in not imposing a life sentence, and in forming that opinion the court must have regard to the purpose of Parliament in enacting the section”.

In *R v Okinikan* (1993) 2 All ER 5 the court was considering the meaning of exceptional circumstances. At page 8 Lord Taylor C.J. said –

“This court cannot lay down a definition of “exceptional circumstances”. They will inevitably depend on the facts of each individual case. However, taken on their own, or in combination, good character, youth and an early plea are not exceptional circumstances justifying a suspended sentence. They are common features of many cases. They may amount to mitigation sufficient to persuade the court that a custodial sentence should not be passed or to reduce its length”.

In *R v Rehman* (2005) EWCA Crime 2056 (18<sup>th</sup> July 2005) at paragraph 11 the Lord Chief Justice said:

“First they show that he was focusing on cases requiring consideration of whether there are exceptional circumstances when there is a need to look at all the circumstances involved. Then it is not appropriate to look at each circumstances separately and to conclude that it does not amount to an exceptional circumstance. A holistic approach is needed. There will be cases where there is one single striking feature, which relates either to the offence or the offender, which causes that case to fall within the requirement of exceptional circumstances. There can be other cases where no single factor by itself will amount to exceptional circumstances, but the collective impact of all the relevant circumstances truly makes the case exceptional”.

### **Carol Marie Scott**

In sentencing Ms. Scott the Chief Justice recognized the duty of the court to do what it can to deter others from committing similar offences. He also recognized that the sentence should be one of an immediate term of imprisonment. The Chief Justice identified what he regarded as mitigating factors. The Chief Justice said:

“It is important to send a right message to others who would commit this type of offence, and as I emphasise that while your sentence will be by no means an easy one, as you will soon understand, it is intended to meet the particular circumstances of your case and others who out of a sense of sheer dishonesty and greed who commit such offences must, nonetheless, expect to be dealt with by the full measure of the law”.

Again:

“I reflect that it can hardly be in society’s best interest for you to be taken away from your two very young children, who would have no one else to turn to for their support; at least not yet while there are other options open to the court.

In this regard, I note again that you were sent immediately to prison the first and only time you have had a conviction for dishonesty recorded against you. Perhaps you would have been better served, and by extension society; by a more remedial form of punishment, and that is what I hope to achieve now”.

In our view the Chief Justice erred in considering the case of Ms. Scott. She had a previous conviction for a similar offence. On appeal to this court, a custodial sentence was regarded as the appropriate sentence in such a case. It would have been open to the Chief Justice to impose a foreshortened punishment period of immediate imprisonment as was done in Kefford’s case. This of course would depend on the circumstances of the particular case.

The fact of having young children, which is by no means unusual in cases that come before this court, is not an exceptional circumstance. The mitigating factors identified by the Chief Justice when taken together do not in our view amount to “exceptional circumstances”.

In our view the appropriate sentence should have been one of immediate imprisonment. The court has been informed that Ms. Scott has already served the community service order. If a sentence of immediate imprisonment had been imposed, it is unlikely that a community service order would have been made. We have therefore come to the conclusion that it would not now be appropriate for the court to now impose a custodial sentence.

However, the compensation order remained and it was ordered by the court that there should be payment of \$30,000 by monthly installments and in default 3 months imprisonment.

The amount of monthly payment to be determined by the trial Judge.

In the circumstances the appeal by the crown was dismissed.

### **Kevin Fyne**

The appellant was a junior officer employed by a Building Society. He was influenced by senior officers into joining a fraudulent scheme being operated by them.

The offences for which he was charged were committed between December 1997 and January 1999. He was arrested in 1999 and promptly admitted his guilt, but not brought before the court until April 2003. He pleaded guilty in August 2004 but was not sentenced until October 23, 2006 almost eight years after he admitted committing the offences.

There are unusual aspects in the appellant's case. He co-operated fully with the police by informing them of the scheme and how it was operated. He subsequently returned to work in his former position in order to gather evidence

for the police with respect to other employees. He even tape recorded conversations with other employees. As a result of the important evidence he gathered, the police were able to prosecute other senior employees. He offered and in fact gave a written statement to the police and agreed to give evidence against them. He appeared in court to give evidence but there was a belated plea of guilty and he was no longer required to give evidence.

The assistance given to the police went beyond the normal co-operation of confessed offenders. He committed the offences when he was between 19 – 21 years old. He promptly admitted his guilt but, as a result of his assistance and the investigations and prosecutions which followed, he was not sentenced until almost eight years after he had admitted to the offences.

There were therefore very strong mitigating factors which in our view amounted to “exceptional circumstances” and would justify a departure from imposing immediate imprisonment.

It was for these reasons that we allowed the appeal and varied the sentence by suspending the term of imprisonment for two years. A community service order of 150 hours was also imposed. In addition he was ordered to repay the balance of money not recovered within 14 days and in default 30 days imprisonment.

\_\_\_\_\_  
Zacca, P.

\_\_\_\_\_  
Taylor, J.A.

\_\_\_\_\_  
Forte, J.A.

