43/90

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v HODGE

Crockett, O'Bryan and McDonald JJ

23 October 1990

CRIMINAL LAW – SENTENCING – THEFT FROM EMPLOYER – SECURITY GUARD – LOSS TO EMPLOYER BETWEEN $3600 AND $7600 OVER 3 MONTHS – OLD THEFT PRIORS – WHETHER CUSTODIAL SENTENCE APPROPRIATE.

H., aged 57 years, a security guard for 9 years, permitted over a period of 3 months, goods to be unlawfully removed from his employer's premises H. received $4,000 approx. and taking into account goods which were recovered, the employer sustained a loss between $3600 and $7600. H. pleaded guilty to 4 counts of theft, admitted three old prior convictions for theft and was convicted and sentenced to 3 years' imprisonment with a minimum of two years before eligible for release on parole. Upon an application for leave to appeal against sentence—

HELD: Application dismissed.
The offences amounted to a grave breach of trust and were committed in such serious circumstances as to merit salutary punishment.

CROCKETT J: **[1]** The Court has before it for determination an application by the applicant for leave to appeal against sentence. Upon being presented in the County Court at Melbourne on a presentment which contained four counts of theft, the applicant pleaded guilty to each count. After hearing a plea for leniency, the Judge sentenced the applicant to eighteen months' imprisonment on each of the four counts, and after pronouncing orders for cumulation, the effective term was one of three years' imprisonment in respect of which a non-parole period of two years was fixed.

The applicant, at the relevant time, was a security guard employed at the Sunshine tyre manufacture factory of Pacific Dunlop. Together with another security guard, he entered into an arrangement whereby they permitted a third offender, one Holdsworth, to collect and remove, unlawfully, tyres which were the property of Pacific Dunlop. The first of such thefts occurred in November 1989. On that occasion some 30 tyres were removed and the sum of $4,000 was received by the offenders in respect of the theft, of which the applicant received a due proportion. The next theft occurred in the following month, when again approximately 30 tyres were stolen in the same manner and the same sum of money was received by the offenders for division among them. **[2]** Then on 28th January, 1990, a further theft occurred. On this occasion some 50 or 60 truck tyres were removed by Holdsworth in his vehicle. As with the previous thefts, it appears that the tyres were delivered to two individuals who conducted a tyre retailing business and were prepared to act as handlers of the stolen goods. In respect of the first of the thefts which occurred on 28th January this year, some $6,000 to $7,000 was received by Holdsworth, presumably from the handlers, and this sum was of course available for distribution among those who were involved with the theft, including the applicant.

On the occasion of this theft Holdsworth returned later in the night and took a further load from the premises, this time of some 30 or 32 tyres. However, when travelling in his vehicle laden with the tyres, he was apprehended by the police. This of course prevented his return to the factory with the money which the co-offenders expected would be paid to them in relation to that particular theft. His nonappearance led to a search by the applicant of the whereabouts of Holdsworth. He saw Holdsworth's vehicle parked outside the Sunshine Police Station and was thus alerted to the strong possibility that Holdsworth had been arrested in connection with the theft of the tyres that night. As a result, the applicant returned to the factory and the $6,000 to $7,000 which had been handed to him for distribution between himself and his co-offender at the factory was burned by them in an apparent attempt to avoid possible detection in the future **[3]** of the part which had been played by them in the commission of the offence. In fact it appears that Holdsworth, by the admissions he made to the police, implicated the other two offenders,

who were security guards, with the inevitable result that very shortly afterwards the applicant was interviewed by the police. After an initial disclaimer of complicity in the offence, the applicant confessed fully the part which had been played by him, and in the course of an interview made full admissions of his guilt. It appears that of the tyres which had been taken in the four thefts, 135 were recovered and the unrecovered number of tyres appears to have been something between 9 and 19, constituting a loss to Pacific Dunlop of a sum between $3,600 and $7,600. A total of 144 to 154 tyres were taken altogether. The total sum received by the applicant (and unrecovered from him) in respect of his part played in the offences was some $4,000, or a little less.

The grounds upon which the applicant relies in support of his application, although stated in a number of ways, amount I think essentially to a complaint that the sentence imposed was manifestly excessive. The contention of the applicant's counsel on the hearing of the application was that the Judge was in error in failing to impose a non-custodial sentence. A secondary submission was made that this Court should conclude that, if it was proper for the Judge to impose a custodial sentence, then it should have been what could be described as a short **[4]** sharp sentence rather than one of the length of that which in fact was passed upon the applicant.

The features which operate in aggravation of the offences emerge starkly enough from the mere recitation of the circumstances in which the offences occurred and which I have briefly rehearsed. The principal consideration in that regard is of course the fact that the applicant was employed by the owner of the goods to prevent the very offences in which the applicant himself was implicated. What he did, therefore, was of course a grave breach of the trust which had been reposed in him by his employer. Again, although his contention is that it was one of the other offenders who had induced him to enter into the commission of the offences, the crimes were apparently well planned and committed over a period of about three months. There was in consequence not present any such consideration as a sudden succumbing to temptation. Furthermore the amount of the goods involved and their value were substantial. On the other hand, the Court was reminded of various matters which had been urged upon the Judge in mitigation of the offences. These were principally, if not entirely, matters relevant not to the offence but to the offender. It was pointed out that he was a man who is 57 years of age and in fact will be 58 next month. He had only three prior convictions. They were all for larceny. However, they attracted minor fines and were committed as long ago as 1963 and 1964. Of them the Judge observed that they were "so ancient that they are hardly relevant."

[5] Evidence was called as to the good character which the applicant had enjoyed for many years prior to the commission of the offences and the fact that he had been a faithful servant of his employer, in his capacity as a security officer, for some nine years before the lapse which led to his commission of the offences. The Judge was satisfied that the applicant was remorseful and that he had already, by his detection and conviction, suffered substantial punishment. That final consideration is, I think, a reference to the marital circumstances of the applicant. He had many years ago been divorced. He and his wife had four children. They are now adults However, the applicant recently remarried. His new wife is a young woman from the Philippines She is expecting a child in December and has no relatives and very few friends in this country. The applicant's loss of income following his incarceration has raised for him serious difficulties in the payment of instalments which have to be made on the matrimonial home.

In consequence it is clear enough to see that he faces some considerable difficulties in relation to those matters over the next few months if he is to remain in custody. On the other hand it may be said, of course, that those difficulties, so far as they touch him, are of his own making and they are matters which thus do not lessen the gravity of the offences in which he was involved. Having regard to that catalogue of matters that operate both in aggravation and in mitigation of the offences, I have not been persuaded that the Judge was in **[6]** error in determining that the appropriate disposition of the matter required the imposition of a term of imprisonment. The Judge's attention was of course strongly drawn to the possibility of the passing of a non-custodial sentence. His Honour was plainly alive to the considerations which might have compelled the adoption of such a course.

However, in my opinion, he properly took the view that the offences were so serious and committed in such serious circumstances as to merit salutary punishment. Having reached that conclusion, I find it equally impossible to say that in selecting the term that His Honour did, he exceeded the sentencing discretion which was required to be exercised by him. Consequently I

am not persuaded that the sentence imposed was manifestly excessive and I would dismiss the application.

O'BRYAN, J: I agree.

McDONALD J: I agree also.

CROCKETT J: The application is dismissed. With regard to the matter which was mentioned at the outset of the hearing, we will direct that the record in relation to the sentences passed in the County Court upon the applicant be corrected in order properly to record the sentences which the Judge imposed, namely a sentence of eighteen months' imprisonment on each of the four counts together with a direction that six months of the sentences on each of counts 2, 3 and 4 be served cumulatively with each other and upon the sentence imposed on count 1.

APPEARANCES: For the Crown: Mr D Just, counsel. JM Buckley, Solicitor to the DPP. For the applicant Hodge: Mr M Tovey, counsel. Galbally & O'Bryan, solicitors.
