07/91

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v HUTCHINSON

Crockett, Fullagar and Hampel JJ

19 November 1990

CRIMINAL LAW – SENTENCING – THEFT BY BANK CLEANER OF BLANK BANK CHEQUE – $35,000 OBTAINED $20,600 RECOVERED – PRIOR CONVICTIONS FOR DISHONESTY – "ANTECEDENTS" – WHETHER UNSUSPENDED CUSTODIAL SENTENCE APPROPRIATE.

Whilst employed as a cleaner at a bank, H. took a blank bank cheque form from a drawer, filled it out in the sum of $35,438.90 and forged an issuing officer's signature. She presented the cheque to a bank where she held an account and on a number of occasions, withdrew all of the moneys, of which she spent some $14,800 approximately, such sum now being practically irrecoverable. On the plea, H. admitted one prior conviction for shoplifting and subsequent to the commission of the present offences, admitted to convictions for offences involving welfare fraud. H. was sentenced to be imprisoned for 2½ years with a minimum of 15 months' imprisonment before eligible for release on parole. Upon application for leave to appeal against sentence—

HELD: Application dismissed.
1. In relation to H.'s convictions for the subsequent offences, it was open to the sentencing judge to treat them as antecedents for the purpose of fixing an appropriate non-parole period.

2. Having regard to the nature of the offences, the total amount stolen, the deliberate and calculated way in which the offences were committed and the fact that a substantial sum is irrecoverable, no error was shown by the sentencing judge's imposing a custodial sentence.
***R v Trenorden* MC 39/1989, referred to.**

CROCKETT J: [1] The applicant, on being presented for trial in the County Court at Colac, pleaded guilty to the two counts upon which she was arraigned. They were each counts of theft, the first being theft of a cheque from the Commonwealth Bank and the other being the theft of moneys from the State Bank. The offences were said to have taken place early in January 1989. The applicant admitted one prior conviction. This was also for theft and was recorded in 1985. The sentencing Court had explained to it that that prior conviction was for an offence which arose out of an act of shoplifting for which the applicant was fined $80. However, in the course of the plea for leniency which was made on her behalf, it was revealed that, in respect of offences which occurred before the applicant was convicted on the two counts of theft, she was dealt with summarily for a series of offences which occurred between April 1989 and May 1990. They were therefore convictions which could not be treated as previous convictions in the conventional sense. They were for offences of dishonesty and involved some form of social security fraud. The various offences were in one way or another inter-connected. In the case of each of them the applicant was sentenced to a non-custodial penalty.

The Judge, in respect of the offences with which the Court is now concerned, sentenced the applicant to terms of imprisonment as follows: on count 1, to two and a half years' imprisonment, and on count 2, to two and a half years' imprisonment. By reason of the operation of the principle of concurrency, the applicant's effective sentence was one of two and a half years and the Judge directed that she serve a **[2]** minimum term of fifteen months' imprisonment before she should be eligible for parole.

The applicant now seeks leave to appeal against those sentences. She does so on a number of grounds to which I shall make brief reference in due course. I turn, however, at this point briefly to refer to the circumstances in which the offences were committed. The applicant had commenced work as a cleaner at the Geelong branch of the Commonwealth Bank on 28th December 1988. In the course of her duties she found in a drawer, which had been wrongly left unlocked, a book of blank bank cheque forms. She took one of the forms and made it out to herself in the sum of $35,438.90 and forged an issuing officer's signature. The applicant presented the stolen bank

cheque at the State Bank Centre in Bourke Street, Melbourne, where she had an account. She explained to the teller the size of the cheque she was lodging and that it was a bank cheque by saying that it represented her share of a Tattslotto win. Having lodged it, she unsuccessfully sought to withdraw a substantial sum. She was, however, allowed to withdraw against the credit thus created the sum of $1,000 in cash. Later on the same day, which was 6th January 1989, the applicant sought to withdraw $30,000 from her account at Corio with the State Bank branch at that Centre. The teller suggested that she withdraw such a large sum by way of bank cheque. In fact, she took a bank cheque in the sum of $20,000 and withdrew a further $10,000 in cash. Yet later again on that day she returned to the same State Bank branch and withdrew a further $4,600 in cash from her account.

[3] The Commonwealth Bank took some time to discover the existence of the falsified bank cheque and the fact that there was no recorded credit in respect of its purported issue. As a result of the discovery that was eventually made the applicant was questioned about the matter. She gave a specious account to the police by which she sought to exculpate herself. Notwithstanding that, she was arrested and charged with the offences of theft to which I have referred. The sum of $20,600 of the stolen moneys was able to be recovered from various sources, but $14,838.90 had been spent by the applicant for her own benefit and is for practical purposes irrecoverable. With regard to the sums capable of recovery, the Judge at the time of pronouncing sentence made appropriate orders for restitution. The moneys having been stolen in those circumstances do represent to some extent a breach by the applicant of the trust which had been reposed in her by her employer.

However, it is true to say, as counsel on her behalf put it to the Court, that the offences were of an opportunistic nature and were not the produce of some premeditated plan to commit theft upon the bank. On the other hand, whilst it is true that the evidence shows the applicant suffered certain disadvantages of life and had been under some financial strain, there can be no suggestion that the moneys were stolen in order to provide financial relief to the applicant. The manner in which it was intended that at least some part of the moneys would be spent indicates that the applicant had it in mind to splurge, as it were, the proceeds. **[4]** The applicant relied upon some five grounds in support of her application. The first and fourth grounds were virtually argued as one. The fifth ground alleges that the sentences were manifestly excessive. Grounds 2 and 3, I think, can be described as being merely argumentative of ground 5. The first and fourth grounds involve a submission that in sentencing the applicant as he did the Judge was guilty of identifiable error. What was said was that the Judge should be taken to have treated the offences which I have described and which were not prior convictions, as prior convictions, when to do so was wrong in law.

It was counsel for the applicant who revealed to the Judge the fact of those summary convictions and having done so he took some time to explain the offences to which they related. His revelation followed upon what he perceived was his duty to make a disclosure to the Court about such matters. But having done so, he now contends that an improper use was made of them by the Judge. The Judge in fact made very little reference to them. In the course of discussion with counsel, counsel said to his Honour: "Your Honour cannot treat them, obviously, as prior convictions, and I am sure Your Honour ...". His Honour said: "It does indicate that she has not learned her lesson, though, does it not?" Then in the course of his reasons for sentence the Judge sought to distinguish the case with which he was dealing from a supposedly similar one with which this Court dealt in the unreported decision of *R v Trenorden*, 8th June 1989. In doing so, the Judge pointed out that there were three points of distinction between the two **[5]** cases. He did this because counsel for the applicant sought to rely heavily upon *Trenorden's Case*. The applicant in that case had been dealt with somewhat more leniently than was the applicant in this case. The Judge identified one of the points of distinction in these words, "and your criminal history, both prior to and subsequent to the commission of these offences".

In Fox & Freiberg, *Sentencing State and Federal Law in Victoria*, at pp57-58 the authors point out that in a decision of this Court of some antiquity it had been determined that what may be described as subsequent offences cannot be taken into account as previous convictions to increase the penalty which would otherwise be imposed for the offences for which the offender was presently being sentenced. The authors go on, however, to point out that later conduct, including subsequent offences, can in certain circumstances be legitimately placed before the Court for any

one of a number of reasons; e.g. in the context of a pre-sentence report it would not be improper to describe the latter conduct by reference to details of subsequent offences. Again, such offences may be considered as possible grounds of mitigation. They are also relevant as "antecedents" in determining the non-parole period. They may also be relevant in deciding whether to sentence an offender under twenty-one with detention in a youth training centre rather than imprisonment. Further, they may also be looked at for the purposes of meeting defence claims as to subsequent reformation. The authors cite authority for each of those possible uses which might legitimately be made of subsequent offences.

[6] It seems to me that the little that the Judge did say about the applicant's subsequent offences could be justified on the basis that his Honour was at the least treating them as relevant in the sense that they were "antecedents" to be regarded in relation to the length of the non-parole period that he thought might be appropriate. The observations he made are consistent with such a consideration of the matter. I think, therefore, that he has not erred in the manner alleged. The first and fourth grounds are not made out. So far as the ground alleging that the sentence was manifestly excessive is concerned, it is difficult, I think, to maintain such a ground in the face of the applicant's calculated lawlessness, persisting, as it did, over a number of visits to the bank in order to withdraw substantial sums which she had deliberately stolen by forging a bank cheque. It is true that there are matters personal to the applicant, about all of which we have been reminded, which operate to attract leniency. But, having regard not only to the size of the theft and the deliberateness with which it was executed, it is impossible to say that it was not open to the Judge to impose a custodial sentence. This is the more so when it is realised that a substantial sum will not be subject to recovery. Once one reaches the conclusion that it was open to the Judge to sentence the applicant to imprisonment, it follows, I think, as a matter of course, that it cannot be said that either the effective head term or the non-parole period were excessive. Accordingly, I find that the fifth ground also has not been sustained. The application should, therefore, be dismissed.

FULLAGAR J: I am of the same opinion.

HAMPEL J: I also agree.

APPEARANCES: For the Crown: Mr D Just, counsel. JM Buckley, Solicitor for the DPP. For the applicant Hutchinson: Mr P D'Arcy, counsel. Lamb Cassidy & Simmonds, solicitors.
