29/91

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v CHANDRA

Young CJ, Crockett and JD Phillips JJ

26 August 1991

CRIMINAL LAW – SENTENCING – OBTAINING FINANCIAL ADVANTAGE BY DECEPTION – $29,500 ERRONEOUSLY CREDITED TO BANK ACCOUNT – ERROR NOT DETECTED BY BANK – MONEY SPENT – PLEA OF GUILTY – OFFER OF RESTITUTION – WHETHER IMMEDIATE IMPRISONMENT APPROPRIATE.

A bank erroneously informed C's wife that she was recorded as being the holder of an interest bearing deposit in the sum of $29,598.74. C. contacted the Bank and arranged for the deposit to be transferred to an account over which he had control. From that time, C. withdrew the money which he spent on a motor car and holidays interstate. Five months after the transfer, the Bank made enquiries into the matter and C. was subsequently charged with one count of obtaining a financial advantage by deception. At the trial, C. pleaded guilty and admitted one prior conviction for obtaining property by deception for which he had been fined $500. When questioned by police, C. made an offer to make restitution to the Bank. The trial judge sentenced C. to 18 months' imprisonment with a minimum of 12 months before eligible for release on parole. On appeal against sentence—

HELD: Appeal allowed. Sentence quashed. Imprisoned for nine months wholly suspended for twelve months. In considering sentence, the circumstances of the offence and the offender should be fully understood. In the present case, it was not necessary to give undue weight to the offender's previous conviction but to take into account not only the early offer to make restitution but also the plea of guilty and the nature of the temptation placed before the offender.

YOUNG CJ: [1] This is an application for leave to appeal against sentence by David Anesh Chandra, who pleaded guilty in the County Court in May of this year to one count of obtaining a financial advantage by deception. After hearing a plea made on the applicant's behalf the learned trial judge sentenced the applicant to be imprisoned for a term of eighteen months and fixed a minimum term of twelve months to be served before he should be eligible to be released on parole.

The applicant seeks leave to appeal against the sentence so imposed upon a number of grounds which I shall not read in full. The first ground is that the sentence was manifestly excessive in all the circumstances. The remaining rounds, which were laborately investigated, may be treated, I think, as explanatory and supportive of that first principal ground. The financial advantage which the applicant obtained was obtained from the Westpac Bank in circumstances which were somewhat unusual. In about October 1988, the Westpac Bank in Brisbane sent to the wife of the applicant at their address in North Melbourne a certificate of bonus deposit which certified that in the books of the Westpac Banking Corporation, the applicant's wife was recorded as the holder of an interest bearing deposit in the amount of $29,598.74 lodged with the bank on 14 October 1988 for the term of one month at the rate of eleven per cent per annum and, therefore, to mature on 14 November 1988. The certificate stated that the deposit plus interest would be renewed for the same term and at each successive date at the rate of interest applicable at that time. When that notice arrived, the applicant appears to **[2]** have telephoned to the bank in Brisbane, although it is not exactly clear what the conversation was. It seems probable that the applicant asked whether that certificate of deposit was properly in his wife's name.

Whether that be so or not, what the applicant did shortly after receipt of that certificate of deposit was write to the bank in connection with it and ask to have the bonus deposit transferred to his wife's Advantage Saver account at Westpac's Collins Street, Melbourne branch and he stated that he needed the funds for the purpose of a car which he was wishing to buy and which was a real bargain if he could obtain the money in time. Acting upon that instruction, the bank sent the money to the Advantage Saver account in the applicant's wife's name in Melbourne, an account over which the applicant had control, and from that time onwards the applicant was able to expend the money. He bought a car and, indeed, a holiday in Queensland with his family and made some other purchases; but it was submitted to us by Mr Salek that much of the money was spent on his family's requirements rather than on matters of self indulgence. The applicant

was a man of 33 years of age. He acknowledged one previous conviction for obtaining property by deception for which he was sentenced to be fined five hundred dollars in default ten days' imprisonment. The circumstances of that offence were explained to the learned judge during the course of the plea and, without going into them in detail, it may be said that they did not reflect a very serious offence so far as the applicant was concerned.

It is quite clear, I think, that the applicant was **[3]** confronted with a very tempting situation. He was a man of no great financial resources, and in those circumstances the error by the bank – and it was plainly an error – placed him in a situation where he acted promptly so that he was able to obtain what was to him a significant amount of money. Although the bank transferred the money to the Advantage Saver account in November 1988, it was not until April 1989 that the bank contacted the applicant for the purpose of enquiring into the matter. When the applicant was apprehended by the police, at the end of a long record of interview he did say that he was sorry for what he had done and that he would be willing if he were able to restore the money to the bank.

When passing sentence, the learned judge referred to the matters which I have mentioned and also noted that a consent order had been made by the court by which the applicant had been ordered to make restitution. His Honour added:

> "In my opinion, your consent was not given out of any sense of remorse or contrition, reflecting merely an acceptance of the inevitable."

Whilst that comment may perhaps have been justified, it ignores an earlier offer to make restitution when he was questioned by the police. During the course of the plea, His Honour indicated that he saw no other alternative but to impose a custodial sentence and from His Honour's sentencing remarks and what was said during the plea, it is plain that His Honour regarded the fact that the applicant already had a previous conviction for obtaining property by deception as excluding the possibility that he should receive anything **[4]** but a custodial sentence for this offence. His Honour noted that the applicant had pleaded guilty without indicating that he reduced the sentence he would otherwise have imposed upon that account. Reading the learned judge's reasons for sentence as a whole, it seems clear that it was the fact that the applicant had acknowledged a previous conviction that led His Honour to impose the sentence which he did. In so doing, it seems to me that the learned judge did not give sufficient weight to the temptation which was placed before the applicant in circumstances which made it difficult for him to resist. It seems to me that His Honour gave undue weight to the previous conviction of the applicant for obtaining property by deception and that His Honour gave insufficient credit for the plea of guilty.

When the principal ground of an application for leave to appeal against sentence is that the sentence was manifestly excessive, it is not generally possible to argue that ground at length. What is important is that the circumstances of the offence and of the offender should be fully understood and when they are so understood it is possible to say whether the sentence is, in all the circumstances, manifestly excessive even though it may not be possible to point to any actual sentencing error on the part of the sentencing judge.

I have come to the conclusion in the present case that the sentence which the learned judge imposed was, in all the circumstances, manifestly excessive. Chief among the circumstances which lead to that conclusion are the temptation which was placed before the applicant in his particular financial position and the plea of guilty which **[5]** he entered. It was the bank's error that put the applicant in control of a large sum of money and the bank did not follow up its error for five months. In all the circumstances, the offence was not one which I think required the learned judge to impose a custodial sentence. I would therefore propose that the court should set aside the sentence imposed and in lieu thereof should sentence the applicant to imprisonment for a term of nine months, such sentence to be suspended for a period of twelve months.

CROCKETT J: I agree. **JD PHILLIPS J:** I agree also. **YOUNG CJ:** The order of the Court is that the application is granted, the appeal treated as instituted and heard instanter and allowed. The sentence is quashed. In lieu thereof, the applicant is sentenced to a term of imprisonment for nine months and that sentence is suspended for a period of twelve months.

APPEARANCES: For the Crown: Mr D Just, counsel. JM Buckley, Solicitor for the DPP. For the applicant Chandra: Mr D Salek, counsel. Nicholas Giasoumi, solicitor.