39/89

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v TRENORDEN

Crockett, Marks and Southwell JJ

8 June 1989

CRIMINAL LAW – SENTENCING – FORGERY/UTTERING/THEFT BY BANK EMPLOYEE – $15500 UNLAWFULLY OBTAINED – PLEA OF GUILTY – REMORSE SHOWN – NO PRIORS – EXCELLENT PROSPECTS OF REHABILITATION – WHETHER CUSTODIAL SENTENCE APPROPRIATE: *CRIMES ACT* 1914 (CTH), SS20AA, 67B.

T., a part-time bank teller, (aged 25 years, married with 7 yr-old son) over a total period of approx. 6½ months, made a number of false transactions by using various bank accounts to unlawfully obtain the net sum of $15500. Upon arraignment, T. pleaded guilty to 10 counts of forgery and uttering and 8 counts of theft, and was sentenced to an aggregate period of 18 months' imprisonment with a minimum of 12 months before being eligible for release on parole. Upon application for leave to appeal against sentence—

HELD: Application granted. Sentence quashed. Defendant released upon entering into a $1,000 recognizance to be of good behaviour for 3 years.
Although the offences were serious, especially having regard to the fact that they involved a breach of trust, mitigatory factors such as the defendant's admission of guilt, remorse, lack of prior convictions, her domestic situation and excellent prospects of rehabilitation called for the imposition of a non-custodial sentence.

CROCKETT J: **[1]** The applicant was employed by the Commonwealth Bank of Australia as a part-time teller at the Corio Branch from 2 February 1984 to 10 November 1987. Her duties included general clerical work and processing withdrawals and deposits on behalf of customers. Between the periods 18 November 1986 to 10 February 1987 and 9 July 1987 to 26 October 1987 the applicant made a number of false transactions through various bank accounts. Those transactions involved the completion of withdrawal forms and deposit forms in various of the holders' names and the subsequent processing of those forms. On some occasions money withdrawn from an account was re-deposited at a later stage into the same account, and on other occasions money withdrawn was deposited into another customer's account in an attempt to replace previously withdrawn money. However, the applicant did not always re-deposit the money withdrawn, and those instances in which she did not do so constituted misappropriation by her of such moneys from her employer.

On 18 March 1988, when the falsity of the entries for which she had been responsible had been detected, the applicant was interviewed by the Australian Federal Police. In the course of the interview she admitted that she had withdrawn and deposited funds without the authority of the account holders, and admitted also to retaining some of the money. The result was that she was charged with a very substantial number of offences of forging a document deliverable to a public authority under the Commonwealth, namely the Commonwealth Savings Bank of Australia contrary to s67B of the *Crimes Act* 1914, and the corresponding **[2]** offences in each case of uttering the document knowing it to be forged and being a document deliverable to a public authority under the Commonwealth. She was also charged with a number of offences of stealing property belonging to a public authority under the Commonwealth, those charges being in relation to the theft of moneys which had not been the subject of repayment to any account.

The applicant indicated at an early stage her intention to plead guilty to the offences with which she was charged. As a result, she was indicted on only ten counts of forgery, ten counts of the corresponding offences of uttering and eight counts of theft. Upon indictment, she did, in fact, plead guilty to each count and the County Court Judge before whom the matter had come imposed sentences in respect of each offence. After taking account of orders for cumulation which were pronounced by the Judge, the aggregate sentence was one year and six months' imprisonment, and the Judge fixed a minimum term of one year as that to be served before the

applicant should be eligible for parole. The net sum which was retained by her as a result of all the improper dealings of which she was guilty is agreed by both the Crown and the applicant's legal representative to be the amount of $15,500, and, in fact, when sentencing the applicant the Judge made an order that she pay the Commonwealth Savings Bank that sum.

The applicant now seeks leave to appeal against the sentences so imposed upon her, and she does so in reliance upon a number of grounds. Those grounds include the contention that in the course of exercising his **[3]** sentencing discretion, the Judge fell into error in various ways.

It is convenient, I think, at the outset to consider one of the alleged identifiable errors of which it was said that the Judge was guilty. Counsel, in the course of presenting a plea for leniency submitted that it would not be inappropriate for the Judge, if he saw fit to impose a sentence of imprisonment, to suspend that sentence on a condition that some form of reparation be made by the applicant to the Commonwealth Savings Bank in satisfaction, or at least in partial reduction, of the sum of $15,500.

There is power under the Commonwealth *Crimes Act* 1914 for a sentencing Judge in relation to a Commonwealth offence, such as these offences are, not only to direct the suspension of a sentence regardless of the length of that sentence, but also to impose a term or terms to be complied with as conditions of the suspension of the sentence. The Judge appears, from the transcript of proceedings, clearly to have been of the view that adherence by the applicant to any such condition would be difficult for her. It seems that by reason of this consideration the Judge rejected as a possible form of disposition this particular penal alternative. However, the provisions of the *Crimes Act* make it clear that if a sentence is suspended on terms and conditions, the person bound by those terms and conditions may apply to a Judge for a reconsideration of the terms and for relief from their effect in the event that circumstances have occurred as would be thought to justify the granting of any such relief so sought.

[4] The relevant provisions in relation to this can be found in s20AA sub-ss.(1), (3)(d) and (e). Those provisions read as follows:

> "(1) Where a person has entered into a recognizance in pursuance of an order made under sub-section 19B(1) or 20(1) [which I interpolate to say are the provisions which enable the suspension of the sentence with terms or conditions attached to such a suspension] any of the following persons may apply to the Court by which the order was made for the discharge of the recognizance or for a variation of its terms:
> (a) an authorized person;
> (b) the person [and I interpolate relevantly to this case] who entered into the recognizance;
> (c) a surety for the person who entered into the recognizance;
> (d) a probation officer appointed in accordance with the order."

Sub-section (3)(d) and (e) provides:

> "Where an application is made under sub-section (1) for a variation of the terms of a recognizance the Court (whether or not constituted by the Judge or Magistrate who made the order in pursuance of which the recognizance was entered into) may, if it is satisfied that notice as required by sub-section (5) or (6) has been given and it thinks fit to do so, vary the terms of the recognizance in all or any of the following ways:
>
> (d) by reducing any liability to make reparation or restitution, by reducing any instalment of any reparation or restitution or by reducing the amount of, or any instalment of any costs, compensation or penalty; or
>
> (e) by altering the manner in which any reparation, institution, compensation, costs or penalty, or any instalment or any reparation, restitution, compensation, costs or penalty, is or are to be made or paid."

[5] I am of the opinion the sentencing Judge (and counsel) considered the question of whether or not the applicant should be given a suspended sentence upon her entry into a recognizance binding her to make reparation in ignorance of the provisions to which I have just referred. In that circumstance it must follow, I think, that the Judge's sentencing discretion miscarried as those provisions were highly relevant to the exercise of the discretion. That being so, I am of the view the sentence must be quashed, that it is unnecessary to consider the other

grounds and that it is for this Court to consider for itself what it believes is an appropriate sentence in all of the circumstances.

I have indicated the circumstances in which the offences came to be committed. Undoubtedly they are serious offences rendered not any the less so by reason of the fact they involved the breach by the applicant of the trust which had been reposed in her as a bank employee. Nevertheless there are very cogent reasons to be advanced in mitigation of the offence and in extenuation of her conduct.

She admitted from the outset her implication in the offences. She had had hitherto a good employment history particularly in employment involving both responsibility and trustworthiness on her part. If in fact she were called upon to serve a custodial sentence, she will almost certainly lose the employment that she presently has held over for her and the securing of alternative employment at the conclusion of service of a term of imprisonment is likely to prove difficult for her. **[6]** There is no question that she has suffered great remorse in respect of the offences she has committed and felt a sense of disgrace not only for her participation in the offences but for the humiliation which has resulted both to her own family and also to her husband. Most important features are that she was only 25 years of age at the time of the commission of the offences, is a person without prior convictions and is a young married woman with a 7-year old son for whom to care. She has excellent prospects of rehabilitation; indeed to the point where I think it could be confidently expected she is unlikely to re-offend. The preservation of the marriage is likely to be strengthened by a non-custodial penalty and in all the circumstances I would propose that an appropriate sentence would be that the applicant, if she is prepared to enter into it, be released on a three year good behaviour bond.

MARKS J: I agree and I agree with the proposed sentence.

SOUTHWELL J: I also agree.

APPEARANCES: For the applicant Trenorden: Mr P D'Arcy, counsel. Andrews & Backhouse, solicitors. For the Crown: B King, counsel. Commonwealth DPP.
