01/90

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v NEWMAN

Young CJ, Crockett and Nathan JJ

29 November 1989

SENTENCING – THEFT OF MONEY FROM EMPLOYER OVER PERIOD OF TEN MONTHS – STRAITENED CIRCUMSTANCES LED TO OFFENDING – PREVIOUSLY CONVICTED FOR SIMILAR OFFENCES – WHETHER UNSUSPENDED CUSTODIAL SENTENCE APPROPRIATE.

The accused stole $19,941.76 (over a period of 10 months) from employer – pleaded guilty – deprived background – lack of finances led to offending – previously convicted on one court appearance of 45 similar offences – sentenced to 2 years' imprisonment with minimum of 15 months before eligible for release on parole – no error.

YOUNG CJ: **[1]** The Court has before it an application for leave to appeal against sentence by Linda Martina Newman, who pleaded guilty in the County Court to a charge of theft. After a plea had been made by counsel on the applicant's behalf, the learned trial Judge sentenced the applicant to be imprisoned for a term of two years and fixed a minimum term of fifteen months to be served before she should be eligible to be released on parole. She now seeks leave to appeal to this Court on the ground that the sentence so imposed was manifestly excessive and did not take into account matters put on the plea.

It is unnecessary to detail the evidence available to the Crown to support the charge, as the applicant pleaded guilty to it. It is necessary, however, to say that the theft was of an amount of $19,941.76 and the victim of the theft was the applicant's employer, McPhee's Transport, and the theft took place between 1st August, 1987 and 11th June, 1988. It is a case where a person has stolen from her employer when she was employed in a position of trust. Unfortunately, this is not the only time that the applicant has committed such an offence. She, in fact, admitted 45 previous convictions but those were all from a single court appearance on 7th November, 1985, and in substance they were offences of the same character. They were offences of theft from her then **[2]** employer. On that occasion she was ordered to perform 125 hours of community service on the first 44 of the charges and was sentenced to pay a fine of $300 on the last of the charges.

Mr Smith, who has appeared for the applicant in this Court, although he did not appear for her on the plea, has tendered an affidavit which he asks us to look at on the applicant's behalf in support of the contention that the applicant's background was not sufficiently taken into account by the learned sentencing Judge. We can only accept fresh evidence in this Court according to strict rules and it is not within those rules to accept evidence which was available at the time of the plea or trial in the court below and for whatever reason was not then called. But we allowed the argument to proceed without finally ruling upon the admissibility of the evidence and we find on reading the affidavit which is tendered that there is little, if anything, in it which was not advanced by counsel for the applicant during the course of the plea, although it was then only stated by counsel and not established by sworn evidence. It does not, however, appear from the transcript and there is nothing to suggest that the learned sentencing Judge did not accept what he was told by counsel and, therefore, even if we were to accept the affidavit, we would be in no better position than the learned Judge as to the material upon which this case must be decided.

[3] The essence of the plea and the essence of the argument which Mr Smith has presented to this Court is that the applicant came from a very unfortunate background and she has had a very difficult life. She is aged now thirty-four years and has a daughter by a de facto relationship. Apart from the two groups of offences which she has committed she has been a law-abiding citizen, but she has been badly treated by the person with whom she has been cohabitating. His failure to support her and the child produced a situation so acute that the applicant fell into the temptation of stealing from her employer.

What has to be remembered, however, is that this was not just a single act of theft. The stealing from the applicant's employer took place over a considerable period from 1st August 1987 until 11th June 1988. The applicant achieved the theft of the money because it was part of her duty to take consignment notes from the drivers employed by McPhee's Transport Company and the money and check them and she was required then to forward cheques to the supplier on whose behalf the delivery was made and place the cash in the company's trust account, and she simply did not do that and did not enter the cash on the delivery register as she should have done.

Initially when apprehended by the police her explanation was that she was being blackmailed, but it later appeared that that was a fabrication and the material advanced on the plea suggested that she **[4]** took the money because the person with whom she was living was simply not providing for her and her child as well as she thought was necessary. Mr Smith contended that the learned trial Judge had given too such weight to her previous conviction, had indicated that he thought that the applicant had been treated lightly on a previous occasion, and that accordingly he was in fact imposing upon her a penalty that was more severe than necessary, and was in fact punishing her now for the first series of offences.

In my view, there is no substance in that contention. It was obviously a relevant factor for the learned Judge to take into account that the applicant had been previously convicted for similar offences. His Honour observed that the applicant had been dealt with leniently on the previous occasion, and so indeed she had. But the purpose of His Honour's observation was contained in the second part of the sentence from which I have quoted, because His Honour went on to say, "obviously you did not learn your lesson from that experience". No doubt it was that consideration almost more than any other that led His Honour to conclude that he was unable to do as he was asked, to make another Community Based Order, or else impose a suspended sentence, and could see no alternative but to impose a gaol sentence.

[5] In my view, there is nothing to indicate that His Honour made any error or imposed a sentence that was manifestly excessive in all the circumstances. Accordingly, I think that the application should be dismissed.

CROCKETT J: I agree.

NATHAN J: I agree.

YOUNG CJ: The order of the Court is that the application is dismissed.

APPEARANCES: For the Crown: Mr D Just, counsel. JM Buckley, Solicitor for the DPP. For the applicant Newman: Mr R Smith, counsel. Pearsons, solicitors.
