NZLR.

IN THE HIGH COURT OF NEW ZEALAND 6/10
DUNEDIN REGISTRY A.P. No.57/95

1298

BETWEEN STEPHEN JAMES FARQUHAR

Appellant

NOT RECOMMENDED

A N D POLICE

Respondent

Hearing: 8 September 1995

Counsel: Mrs J.M. Ablett-Kerr, Q.C & G. King. for the Appellant
W.J. Wright for the Respondent

Judgment: 8 September 1995

ORAL JUDGMENT OF TIPPING, J.

This appeal against sentence by Stephen James Farquhar puts in issue a total sentence of nine months imprisonment. The Appellant pleaded guilty in the District Court, very promptly, to charges of theft as a servant, there were two of those, and to charges of ordinary theft of which there were three. The people from whom the money was stolen were two organisations. First there was the New Zealand Federation of Sports Medicine and secondly there was an organisation called the Sports Injuries Clinic. The latter organisation came into the picture late in the sequence of events. The Appellant was Executive Director of the former organisation. In all something a little over $71,000.00 was taken over a period of several years.

The Appellant has already repaid $40,000.00 and he is taking steps, with the assistance and support of his wife, to repay the balance. The Judge made an order for reparation in the total sum involved largely at the invitation of the Appellant, through counsel, because it was his wish,

appropriately, to repay the money. The Appellant and his wife are in the course of selling their home for the purpose of raising the balance of the reparation, although this has not yet been achieved. I accept, as did the learned Judge below, that this is a case where it can be taken that full reparation will be achieved as soon as possible. That is obviously a substantial factor but, for present purposes, it is one which the learned Judge expressly mentioned at several points in his careful and detailed sentencing remarks. It cannot be and was not suggested that the learned Judge had overlooked the point.

What was submitted by Mrs Ablett-Kerr and Mr King was the proposition that the learned Judge had given inadequate weight to the reparation aspect and also to the prompt plea of guilty. It was further argued that the learned Judge had not sufficiently applied or related to the circumstances of this case the sentencing principles to be derived from two cases in particular called Wang and Bates; I will mention them again in a moment. The argument for the Appellant is that the learned Judge should have imposed a suspended term of imprisonment, coupled with a lengthy term of periodic detention or as a fall back position and an alternative that the term of imprisonment that was actually imposed should have been shorter. That amounts to a submission that the sentence actually imposed was manifestly excessive in its length.

I remind myself, as I am bound to do, sitting on appeal that the issue for me is not exactly the same as it was for the sentencing Judge. My task is to decide whether the sentence imposed was wrong in principle or was manifestly excessive as to length. It is sometimes put that the sentence was inappropriate. That, of course, is another ground of appeal but it is closely related to the proposition that the sentence was wrong in principle. Therefore I must first consider sitting on appeal whether the decision of the Judge to impose a sentence of imprisonment in this case, a full sentence of imprisonment, rather than a suspended sentence was inappropriate or wrong in principle.

That depends, in part, upon whether s.6 of the Act prevailed in the sense that it provided an embargo against imprisonment in this case. The effect of the section, as is well known, is that for this sort of offence imprisonment is not to be imposed unless no other course is properly open; in other words, unless any other sentence would clearly be inappropriate or inadequate. The Judge was satisfied that in spite of s.6 imprisonment should be imposed here. Having considered very carefully as they were presented the arguments on behalf of the Appellant and the arguments on behalf of the Crown I find myself unable to disagree with the learned sentencing Judge in this respect.

It seems to me that when one considers the precedent cases as well as the individual features of this present case, the Judge cannot be said to have reached a decision on this aspect which was either inappropriate or wrong in principle. There is always a degree of tension in an individual case between the need for consistency and the need to give full weight and effect to the features of the individual case. One should not be bound or hidebound by earlier factual precedents but on the other hand there is a public need for some degree of consistency otherwise confidence in the system evaporates. But against that the Court must be very careful not to regard itself as tied to a particular result because of precedent because every case has its own particular mix of features which must be carefully weighed.

I do not propose to go into any discussion of precedent or principles in this aspect of the case, i.e. the question of whether imprisonment per se was inappropriate or wrong in principle. I will simply state briefly my reasons for agreeing in this respect with the sentencing Judge. Those reasons are basically these in combination. First of all there was a serious breach of trust. That cannot be denied and no attempt, properly, was made to deny it. Secondly there was a considerable amount of money involved, by no means as much as in some of the other cases that were mentioned to me but the level here of $71,000.00 is into the area where sentences of imprisonment are

conventionally to be found. That does not mean automatically that this case required imprisonment but it is a relevant factor.

The next matter which influences me is that this was not just a one off or two off affair, as one sometimes finds. This was a course of conduct carried out over a significant period of time. It may have been a less sophisticated course of conduct than in some of the cases that have been mentioned but nevertheless it was sustained and determined. I have given credence to the fact that the Appellant himself appears to have shut the door on himself by the termination of what was called the 004 account. If the matter had stopped there one does not know what the correct result might have been but it cannot be overlooked that he started up again, albeit perhaps to a lesser extent.

And the final matter which I think is relevant, although not a matter of major dimension in this case, is the fact that this was theft from charity funds, charity in the sense of the money having been obtained by voluntary contributions or grants. While it is difficult to distinguish between the origin of the monies stolen I think most people would say that that adds a particularly unpleasant dimension to the case. I am therefore of the clear view that when one looks at all of those features and indeed some of the other matters that were mentioned to me, there can be no doubt that the learned Judge was right in his assessment that this was a case where any sentence less than imprisonment would have been clearly inappropriate or inadequate in terms of s.6.

The more difficult matter, perhaps, is as to the precise length of the term. A number of cases having a greater or lesser degree of comparability with the present were mentioned to me. First there was the case of Wang which I have already referred to. This was a case in Auckland, the appellate judgment having been delivered by Robertson, J. on 6 September 1994 Auckland A.P. 235/94. Mr Wang worked for the Auckland Savings Bank. He opened 29 fictitious accounts over a period of six months and thereby stole a figure approaching half a million dollars. It was decided that it was not appropriate in

that case to suspend the almost inevitable sentence of imprisonment. There was a degree of sophistication in the method but His Honour reduced the District Court sentence of fifteen months to one of eight months for the reasons which he gave in his decision.

The case of Bates which was also mentioned by counsel, was a decision of the Court of Appeal. The Court comprised Cooke, P. and Gault and McKay, JJ., the judgment being given by Gault, J. on 23 August 1994 C.A. 191/94 or 260/94 (both numbers appear on the copy I have). It was a sentence of eighteen months reduced to twelve. The Appellant Bates was what was described as an unqualified accountant who had stolen $105,000.00 from the IHC. He had some distinct experience of accounting in that he had been in some sort of accountancy practice for about thirteen years. His modus operandi was to convert cheques by fraudulently altering the payee. Mrs Ablett-Kerr argued that the Judge in the present case had placed too much emphasis on Bates and that the present case was not as similar to Bates as it might appear at first blush. It was said that the present Appellant was in no sense a professional and it is agreed, I think, that Mr Farquhar has no accountancy skills or background. In addition it appears that Bates had one previous conviction, albeit a long time before.

Counsel also mentioned to me the case of O'Connell in respect of which the only report I have is from the Otago Daily Times. This related to a Gore accountant who was sentenced recently to fifteen months imprisonment on nineteen charges of fraud. The sum involved was $165,000.00. There was a total inability, so it appears, to make any reparation which is in distinct contrast to the present case. Reference was also made to my own judgment in Steel & Riordan Christchurch A.P. 338 & 337/90 judgment 10/12/90. That case involved a young woman who worked for the Inland Revenue and who by a very sophisticated system of fictitious accounting had extracted some $80,000.00

from her employer. She had been able to make some reparation and there was a strong likelihood that she was going to make some more in the future. In that case I reduced a sentence of fifteen months imprisonment down to eight largely because I felt that the learned sentencing Judge had not put enough weight on the reparation aspect, nor on the very substantial mental illness from which it appeared that the Appellant had been suffering, albeit undetected.

Then there have been mentioned to me the Social Welfare type of cases which the Court of Appeal in Bates said were distinguishable in the sense that theft as a servant cases might generally be regarded as being in a somewhat worse category, although as I would read their Honours judgment, not inevitably so. There has been a lot of debate over the years about correct sentencing levels for Social Welfare fraud, largely brought about, I suppose, by the prevalence of them. I myself expressed certain views on this subject in Harris v. Department of Social Welfare (1992) 9 C.R.N.Z. 440 where I upheld a sentence of six months for distinctly less substantial offending in the sense of amounts than the present. I also in that case gave my own views which I think are generally accepted, as to the correct approach to s.6 and s.7 in the present context.

I must remind myself, and I do again, that my task is not as an original sentencing Judge. This Court's function on appeal is to make sure that sentences are kept within broadly acceptable bands. We do not re-sentence in this Court de novo. Before I express my ultimate conclusion I want to mention one further matter which counsel understandably put to me. It concerns certain anomalies that may result from the different parole rules depending upon whether someone gets a sentence under twelve months or over twelve months. I accept on the face of it from what counsel have told me, that it could be thought that there are certain anomalies. For example, it was suggested to me by Mrs Ablett-Kerr that the person O'Connell, to whom I have already referred, his

fifteen month sentence may well amount to an effective five month sentence., whereas the present Appellant's nine months sentence may well amount to four and a half months. There has always been, in my respectful view, some difficulty in this area and I am not out of sympathy with the comparison which counsel put to me.

On the other hand, there are clear expressions of principle in the Court of Appeal, including the case as I recall it, of Raroa and there is another one earlier whose name escapes me, that the effects of remission and parole are generally speaking not to be taken into account in relation to the sentencing exercise. As Mr Wright properly remained me, there can be a number of features that go to make up whether or not the person gets full remission, full parole and so on. Although I can see the force at one level of this aspect of the Appellant's argument, I think it would be quite contrary to principle if I were to take the view that the Appellant's sentence should be reviewed on appeal on account of the general line of argument that I am discussing. This does not mean, of course, that the sentencing Judge in appropriate cases should not, if the point is substantial enough, give some credence to it in the sentence that is actually passed.

The view I have come to, after careful reflection, is that it cannot responsibly be said that this sentence as to length, i.e. nine months, was manifestly excessive. I think if it had been higher than nine months, say twelve, I would have been of that view but it seems to me, after a careful reflection on all the circumstances that have been drawn to my attention, the possible reasons for this offending, the lack of supervision, the lack of assistance and so on, even allowing for those matters it cannot be said that nine months was manifestly excessive. Manifestly in this context means clearly and without doubt excessive. I recognise in coming to that conclusion the force of some of the points that have been made to me.

It is not my function to apportion blame or to discuss what might or might not have happened if firmer controls had been in place or greater assistance had been given to the Appellant. It is not my function either to dwell on the circumstances which appear to have led to this fall from grace from a man who otherwise has a very very good record. Alcohol seems to have been at the bottom of it, coupled with the stress of the job, the two obviously being inter-related. Mrs Ablett-Kerr spoke of the vicious circle constituted by the need for money to fund the habit. It was also put to me that the Appellant was out of his depth financially viz a viz those with whom he was mixing. There may have been some truth in that but at the very bottom of all this I am afraid is the fact that for whatever reason this Appellant has been responsible for a very substantial series of thefts, substantial in their total, from a charity, which was his employer. The Judge expressly took into account the plea of guilty and the reparation. The proposition that he did not give enough weight to those aspects I find unpersuasive. I think without those aspects the sentence of the Judge would have been significantly longer and it could not have been criticised. Both Mrs Ablett-Kerr and Mr King have put the Appellant's case before me in a persuasive manner but I am left at the end of the day with the view that it cannot be said that this sentence was manifestly excessive as to length. As to its nature I have already said that it was not inappropriate or wrong in principle. The appeal is accordingly dismissed.