IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY A.P. No.173/96

BETWEEN PATRICIA ELLEN HENRY

Appellant

A N D POLICE

Respondent

Hearing: 28 August 1996

Counsel: M.J. Callaghan & P.J. van Keulen for Appellant
J.H. Eaton for Respondent

Judgment: 28 August 1996

ORAL JUDGMENT OF TIPPING, J.

This appeal by Patricia Ellen Henry, who is aged 27 but was 26 at the time of the relevant events, is against a total sentence of two years imprisonment. The Appellant, who has no previous convictions, pleaded guilty to a charge of theft as a servant.

In short she stole goods worth just over $400,000.00 from her employer. She was initially employed as a purchasing officer and then as the employer's purchasing manager. She must obviously have had detailed knowledge of the value of the goods stolen. I say that because one of the points made on her behalf by Mr Callaghan was that she had only benefitted to the tune of some $30,000.00 from the thefts. This sum is half the amount for which the stolen goods were disposed of through a company which appears to have been set up by the Appellant specifically for the purpose of dealing with and on-selling the goods which she was taking from her employer.

I am not much moved by the proposition that she only made $30,000.00 out of the whole exercise. The loss to the employer in a direct way was some $400,000.00 and the employer also suffered indirect losses, which it is not necessary to quantify, but which were certainly significant. In addition, of course, the owners of the business for whom Ms Henry was working went through very considerable stress and financial upheaval.

The primary thrust of the appeal is this. First it is submitted that two years was too long and on top of that it is submitted that the period of imprisonment, whatever it may be, should have been suspended. It is relevant to mention the reparation aspect. At one stage the Appellant seemed to be saying that she was likely to be able to repay $50,000.00 but I am told by Mr Eaton for the Crown that as yet nothing has been repaid and the employer's chances of much recovery appear fairly slim. At the very most the amount which the Appellant may in the future be able to repay, either voluntarily or as a result of proceedings that have already been instituted, would seem to be minimal in comparison with the value of the goods taken.

It is accepted and responsibly accepted by the Appellant that a sentence of imprisonment was appropriate, albeit that it should have been suspended. In terms of s.6 there was clearly here a situation where any sentence less than imprisonment would have been inadequate and inappropriate. Once that point is reached it does not automatically follow that a full-time custodial sentence must be imposed. The question of suspension must be viewed before one comes to that conclusion.

The offending went on for quite some time, months rather than days or weeks; it appears some seven or eight months. The Appellant's motivation for the offending, as it was put by Mr Callaghan, was this. She was apparently trying to maintain a relationship with her fiancé by paying the debts of a failed business. It is submitted that the Judge did not give enough weight to

the Appellant's background circumstances and particularly her motivation and the limited amount which she gained from the enterprise.

It is true, as Mr Eaton accepted, that there was no express reference to or discussion of those particular points but I am certain that they will have been made to the sentencing Judge and indeed this was accepted, and it is certain also that he will have weighed them in his balancing exercise. In any event, with respect to the submissions that have been made, I do not regard the point about the net gain to the Appellant or her motivation as being particularly persuasive in the whole context of this serious case of theft as a servant.

I say serious because there was an element of sophistication in what the Appellant was doing. She was altering the employer's computer records so as to mask the loss of the stock. She set up her own company in order to aid in the disposal of the stolen goods. The fact that, for whatever reason, she on-sold the goods at a very considerable discount, only some $16^{1}/_{2}\%$ of their real worth, is not a point which I think she can rely on to any significant extent in her favour. As Mr Eaton rightly says and as the experience of this Court constantly demonstrates, thieves flick on the stolen goods for much less than they are worth.

I am therefore not much persuaded by the proposition that the Judge gave insufficient weight to the matters which Mr Callaghan pressed upon me. He did not expressly refer to them. I am sure he will have borne them in mind and in any event they do not move me to the view that the sentence imposed here was manifestly excessive as to the length of the term. I am quite satisfied that before one gets to the question of suspension a two year sentence was wholly appropriate for the extent and gravity of this offending and to that extent the appeal cannot possibly succeed.

It is necessary now to turn to the issue of suspension which the judge dealt with at the end of his remarks. He dealt with this issue quite briefly but, as the Court of Appeal said in R v. Petersen [1994] 2 N.Z.L.R. 533 to which

Mr Callaghan referred, it is quite often that the same sort of matters that one has considered under s.6 arise for further consideration under the question of whether the sentence should be suspended. As I have said already, the fact that one gets to imprisonment in spite of s.6 does not inevitably mean that the sentence should not be suspended. That second step must be given independent consideration in the light of the Petersen criteria and such other matters as the Court thinks relevant to the issue.

Mr Callaghan took me, quite properly, through that part of the Petersen judgment where their Honours discussed the sort of matters which are relevant to whether or not a sentence of imprisonment should be suspended. They are referred to in particular at page 539 of the report. Mr Callaghan endeavoured to persuade me that the learned Judge did not, when considering the suspension question, take sufficient account of the matters in the Appellant's favour. There were some matters in her favour it must be said. She had a good record, she pleaded guilty immediately and she appeared to be a reasonable candidate for rehabilitation. She also appears to have been reasonably co-operative with the authorities, albeit, as Mr Eaton pointed out, she did not, as some do in this field, volunteer their defalcations to the employer. It was a matter of the employer bringing in the police and then everything came to light.

Against the matters in the Appellant's favour for suspension purposes the Court must, as Petersen itself recognises, consider whether a suspended sentence would adequately protect the public interest and I refer in particular in that regard to page 539 at about line 34. It is essentially a balancing exercise putting in the ledger those matters which might be though to weigh in favour of suspension on one side and those matters which might be thought to point in the other direction on the opposite side. Although the learned Judge did not, as I have said, go through this exercise in any detail he had already traversed most of the relevant points in the earlier part of his sentencing remarks.

In any event I am quite satisfied that His Honour came to a tenable conclusion. Indeed I consider, with respect, he came to the right conclusion. I do not think for one moment that this was a case for suspension. Such an approach, against the gravity of this Appellant's conduct, would, in my judgment, send quite the wrong signal into the community. This was major theft by a person in a senior position gravely breaching the trust that had been reposed in her. It was done with some degree of deliberation and cunning over a period of time and some reasonably sophisticated steps were taken either to try and hide the offending or to assist in it.

Mr Callaghan has raised on this Appellant's behalf all the things that could have been raised but I am quite unpersuaded that a suspended sentence would have been adequate to meet the gravity of this case. The appeal in both its dimensions cannot succeed and his hereby dismissed.

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