PARTIES:	AOINA, Rosita
	V
	O'BRIEN, Patrick
TITLE OF COURT:	In the Supreme Court of the Northern Territory of Australia
JURISDICTION:	Supreme Court of the Northern Territory of Australia exercising Territory jurisdiction
FILE No:	209 of 1993
DELIVERED:	Delivered at Darwin 13 January 1994
HEARING DATES:	Heard at Darwin 17 December 1993
JUDGMENT OF:	Mildren J

CATCHWORDS:

APPEAL - Criminal Law - appeal against sentence by Court of Summary Jurisdiction.

CRIMINAL LAW - Appeal against sentence - sentencing guidelines - general principles - series of offences committed over time all dealt with simultaneously - first offender - whether treated differently from offender who commits several offences at the same time - amount of money stolen is not sole determinant in setting length of sentence - amount of money stolen is relevant to determine whether part or whole of sentence be suspended - sentencing discretion of Magistrate - relevance of lies by accused to sentencer.

STATUTES

Criminal Law (Conditional Release of Offenders) Act 1980 s19b(1)(A)
Criminal Code (NT) ss210, 276(1), 276(2)

CASES

Napper v Samuels (1972) 4 SASR 63, followed.
R v Bird (1988) 56 NTR 17, discussed.
Freeman v Pellford (1988) 92 FLR 122, applied.
House v The King (1936) 55 CLR 499, applied.
R v Jabaltjari (1989) 64 NTR 1, considered.
R v Nicholls (1991) 53 A Crim R 455, considered.

REPRESENTATION:

Counsel
Applicant: R Davies
Respondent: R Wild QC

Solicitors
Applicant: Close and Carter
Respondent: DPP

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

№ 209 of 1993
(9320466)

IN THE MATTER of a Justices Appeal

BETWEEN:

ROSITA ALIETA AOINA
Appellant

AND:

PATRICK JOHN O'BRIEN
Respondent

CORAM: Mildren J

REASONS FOR JUDGMENT
(Delivered 13 January 1994)

This is an appeal against sentence imposed by the Court of Summary Jurisdiction.

The appellant was employed at the time of the offences as an acting team leader in the pay cell of the Northern Territory Department of Education. She had been in the employ of the Department since 15 April 1986. The pay cell's function was to effect variations in the pay of departmental employees. This included variations to her own pay as well as that of a friend and fellow employee in the cell, one Sheree Smith, (who was in fact senior to her). These pay variations were made by computer entries which resulted in the payments being credited to the employees' bank accounts. The appellant was charged with seven counts of stealing (s210 of the *Criminal Code*) and seven counts of unlawfully and fraudulently falsifying data processing material with the intent that it may be acted upon as being correct (ss276(1),(2) of the *Code*). She pleaded not guilty to each charge. The learned magistrate found her guilty of six counts of stealing and six counts of unlawful and fraudulent falsifying of data processing material and dismissed the other two charges. These offences occurred over

a period of five months between November 1991 and April 1992. Each of the stealing charges had a corresponding falsification of data processing charge and together these charges could be seen as one transaction. The total amount involved was $2,450.20. The appellant had no prior convictions for dishonesty. She resigned her position on 20 July 1992 before any charges were laid, and these monies were repaid to the Department out of her termination pay. One group of charges related to an amount of $591 which was stolen for the benefit of her friend Sheree Smith. Each offence carried a maximum of seven years' imprisonment.

The learned magistrate imposed a total head sentence of ten months' imprisonment by imposing a term of four months' imprisonment (concurrent) on each of eight counts and six months' imprisonment (concurrent) on each of the remaining four counts, and ordering those latter terms to be cumulative. He ordered the appellant to be released on 23 January 1994, i.e. after having served a total of three months' imprisonment, upon her entering into a supervised bond upon conditions.

The appellant has abandoned her appeal against the individual head sentences and the total head sentence of ten months' imprisonment. The appellant's main complaint is that the learned magistrate did not fully suspend the sentences. A number of grounds were argued and it will be necessary to deal with each ground seriatim.

The first ground is that the learned magistrate did not give the appellant the full benefit to which she was entitled as a first offender. The learned magistrate, in his remarks upon sentence said:

> "The defendant is a first offender but having said that, she comes before the court as a person who has committed many first offences ... I think that it's something that I can take into account that more than one charge is before the court ... more than one offence has been committed by the defendant. The situation that the defendant finds herself in is one which is vastly different from a person who commits one offence and comes

> before the court or is involved in one single taking and comes before the court. That's not the case here. The defendant was involved in taking on six separate occasions and involved in manipulating the computer or falsely programming the computer on six occasions."

Mr Davies, who appeared for the appellant, submitted that this disclosed error. I do not agree. In *Napper v Samuels* (1972) 4 SASR 63, the Full Court of the Supreme Court of South Australia said that a defendant with no prior convictions, whose first convictions are for a number of offences over an extended period of time, but in respect of which charges are laid simultaneously, cannot expect the same leniency which would be extended to someone who is convicted of one offence of one or more offences committed at the same time. Those observations were made in respect of seven counts of larceny as a servant over a period of less than six weeks.

The next ground was that the learned magistrate described the sum taken as "not a large" and "not a small amount." It was submitted that by comparison with other cases, the amount was 'small' and that this disclosed an error on the learned magistrate's part. However, I do not think that his Worship was wrong to describe the amount in the manner he did. Whether or not an amount is properly to be described as 'small' is a question of degree, and opinions may differ on such an issue. Much depends upon what the amount is being compared with. However, the learned magistrate knew precisely what amount he was dealing with; there can be no suggestion that he thought that the total amount was something other than what it was. In my opinion this ground is not made out.

The third ground related to certain remarks made by the learned magistrate in relation to the effect of a plea of guilty or a finding of guilt upon sentence. My attention was drawn to a statement made by the magistrate that "anyone who pleads guilty gets a discount." It was submitted that this disclosed error. Even if such a held statement is erroneous (cf *R v Jabaltjari* (1989) 64 NTR 1) I am unable to see how this assists the appellant. His Worship observed that the

appellant, because she had not pleaded guilty was not entitled to the leniency she would have received had she entered a plea of guilty. This does not disclose any error on his Worship's part, and this ground must also fail.

Next it was submitted that his Worship gave undue weight to general deterrence. The learned magistrate said:

> "I have to take into account the impact of the offence and the sentence upon the accused's fellow employees. I feel in this type of case, especially where we're dealing with employees in the Public Service, there has to be a sentence to show people, fellow employees in the Public Service, that the Public Service and the community as represented by a Government body is not fair game. You cannot help yourself if you're in difficulties. You have to be on your trust. The fact that you're working in the Public Service and there's a perception perhaps that because you work in the Public Service there are limitless coffers and the perception that you can help yourself has to stop ...
>
> I feel that there has to be a sentence which will show members of the Public Service and members of the community that the Public Service is not fair game. If you work in the Public Service you're on your trust, you can't help yourself to Public Service monies and especially when you're in the defendant's situation where you're in a position of trust where you have a power to certify that something is correct including the power to certify that your own wages or a variation to your wages is correct."

These observations were criticised by Mr Davies, but I do not consider that they disclose any error on the learned magistrate's part. On the contrary, I think they were quite justified, particularly as the learned magistrate had heard evidence indicating that there were a number of other employees in the Department who may have been involved in similar activities.

The next ground of appeal was that the learned magistrate had failed to consider the option of a home detention order. No submission was made to his Worship that this option should be considered and there is no evidence that his Worship called for a report from the Director of Correctional Services. A home detention order cannot be made without both a report from

the Director as to suitability in terms of s19B(1)(a) of the *Criminal Law (Conditional Release of Offenders) Act* and the consent of the offender. No submissions were made to indicate that it was worthwhile calling for a report and that the appellant would consent to such an order. In the absence of such submissions, the court may be misled into thinking either that the defendant's home is unlikely to be suitable for some reason or that the defendant does not consent to the making of an order. It behoves counsel for a defendant who wishes home detention to be considered by the court to raise that possibility with the court. However, even in the absence of a submission by counsel, the court itself should raise the matter with counsel in appropriate cases. Nevertheless, the fact that the issue was not specifically mentioned at all - either by counsel or by the court - does not mean that his Worship overlooked this sentencing option. As Mitchell J observed in *Napper v Samuels, supra,* at 74, "it would be an intolerable burden for courts if it were necessary for them, in passing sentence, to advert to all the penalties which they have power to impose, and to give reasons for selecting imprisonment rather than any other form of penalty." It is inconceivable to my mind that a professional magistrate, sitting daily in the Court of Summary Jurisdiction, would not have turned his mind to the question of whether he ought to suspend the sentence by the imposition of such an order. This ground of appeal therefore fails.

Mr Davies' next argument was that his Worship incorrectly treated a passage in the joint judgment of the Court of Criminal Appeal in *R v Bird* (1988) 56 NTR 17 at 33 as binding authority. In his remarks on sentence his Worship said that: "... the main factor that causes me to impose a sentence of imprisonment is the statement in *Bird*'s case that, 'where the breach of trust is serious it is usually not appropriate to suspend any part of the sentence'." Mr Davies referred to the observations of Kearney J in *Freeman v Pulford* (1988) 92 FLR 122 at 126-7:

> "General sentencing guidelines set out by an appellate court carry great weight but are necessarily orbiter

> dicta and courts of trial may always go outside those guidelines if they consider it right to do so in the circumstances of the particular case. It is therefore incorrect to speak of *Bird* as a 'binding authority' in the sense that it required a particular type of sentence to be imposed."

However I think it is clear that the learned magistrate did not treat *Bird* as binding authority in that sense. As Mr Wild QC points out, in the very next sentence, the learned magistrate went on to say that he intended to suspend part of the sentence. It appears to me that all his Worship did was to approach his task of sentencing bearing in mind the general guidelines set out in *Bird*. This ground of appeal therefore fails.

Mr Davies submitted that his Worship failed to give any weight to the observation in *Bird* that where the amount involved is small, immediate imprisonment is not the usual or expected punishment. I have already observed that the learned magistrate took the view that the amount involved was not small, and that I think he was entitled to take that view. Be that as it may, in *Freeman v Pulford, supra,* at 128, Kearney J observed that "a sentence of immediate imprisonment for breach of trust by an employee is not wrong in principle, even if only a small amount of money is involved." I agree. The amount of money involved is only one of the relevant factors to be considered. In *Bird*, the Full Court said (at 33):

> "<u>While the amount of money taken is not the only determinant of the length of sentence</u>, it is a useful practical indicator. Where very large sums of money are taken, as here, a lengthy sentence of imprisonment is warranted. <u>Other factors being equal</u>, like defalcations should be dealt with by like sentences and more serious defalcations by heavier penalties; this satisfies the need for consistency in punishment, referred to by Mason J in *Lowe v R* (1984) 154 CLR 606 at 610-11; 54 ALR 193 at 196." (Emphasis mine).

Thus, the amount involved is a relevant consideration in both the length of any sentence and also as to whether or not the whole or some part of the sentence ought to be suspended. Indeed, if the amount was very small, a non-custodial

disposition may even be appropriate in certain circumstances. But the amount involved is not necessarily determinative of any of these issues. As was stressed in *Bird*'s case, there are many other factors to be considered. I should add that the court in *Bird*'s case did not purport to exhaustively list all of them - for example, the court makes no specific mention of factors such as a previous history of similar offending by the defendant, attempts to hide the defalcation, the amount of planning involved, or whether others were involved - which may make the instant offences more serious; nor in the case of a single offence, whether the offence was impulsive - which may make the offence less serious; nor of what weight is to be given to the fact that restitution has or has not been made (as to which, see the observations of the Court of Criminal Appeal in *Nicholls* (1991) 53 A Crim R 455). In my view no error has been shown by the learned magistrate in the weight he gave to the amount involved.

The next point was that it was submitted that the learned magistrate failed to give sufficient weight to the principles of rehabilitation, the positive developments in the appellant's lifestyle and circumstances and the matters of mitigation put in favour of the appellant. As to this submission, the learned magistrate did not mention all of the factors put in relation to these matters, but it was not necessary for him to do so. As Bray CJ observed in *Napper v Samuels, supra,* at 68, it is not necessary for a court in imposing sentence to recite seriatim all matters on which it has been decided not to act; but it is different, of course, if it can be shown either by express words or by necessary implication that some relevant matter has been overlooked or wrongly discarded or given inadequate weight. The appellant was a twenty-nine year old single woman. She had resigned her position on 20 July 1992 and had taken until 6 September 1993 to find other employment. She was still in that employment in October 1993 when she was sentenced. She was then earning $275 per week after tax and "expenses." It was put to me that she had a net loss of $150 per week which was ongoing but it does not appear that that information was given to the learned

magistrate. She had had a drinking problem and lived in expensive accommodation at the time of the offences which was the reason for the offences. She had since obtained cheaper accommodation and modified her drinking. Most of these matters were referred to by the learned magistrate either in his remarks on sentence or in the course of discussion with the appellant's counsel during submissions immediately before sentence was passed. Mr Wild QC also pointed out that earlier that same day the learned magistrate, in the course of delivering his reasons for judgment leading to the convictions, had found that the appellant had, when giving evidence at the trial, lied upon her oath. His worship referred to these lies on several occasions during his reasons although he did not refer to them again in his remarks on sentence. It is unlikely in the extreme that his Worship had forgotten that when he later that same morning pronounced sentence. Although an accused person is not to be punished more severely for telling lies (as that is a separate offence for which the appellant was not charged) it is well established that this may disentitle the appellant to any special leniency to which the appellant might otherwise have been entitled: see Thomas *Principles of Sentencing* 2nd ed, p51. In all the circumstances I am not satisfied that it has been shown that the learned magistrate failed to give these factors appropriate weight.

Mr Davies' final submission was that the sentences imposed were manifestly excessive. The nub of this argument was that in cases involving amounts much greater than the amount involved in this case, in almost every case the whole of the sentence or sentences imposed had been fully suspended. Mr Davies supported this submission by putting to me (1) that the appellant had always intended to repay the money (2) the appellant left a 'paper trail' which meant that inevitably her defalcation would be detected and this supported the view that the appellant always intended to repay. In other words, Mr Davies submitted that what the appellant did was obtain unauthorised interest-free loans. Mr Wild QC submitted that this was not the whole picture. Whilst the appellant did leave

a paper trail, what she then did was to maintain that the payments were authorised by her superiors - this was her evidence at the trial, which the learned magistrate did not believe. In other words, there was a certain cunningness involved. The learned magistrate seems to have taken a slightly different view. He observed that her behaviour:

> "was basically to maintain, in some but not all cases a facade of accountability. More often than not she would leave a paper trail. She would not deny the receipt of the money and the money she did receive, she intended to repay when she was capable of repaying. I formed the view that her ... stance was that if payments were queried that she would say first of all, 'It's a mistake' and secondly, 'I will pay it.' But the problem for the defendant was that it was not a mistake. Her taking was deliberate and the second problem for the defendant is that a promise to repay does not excuse stealing."

I think that in the light of these findings by the learned magistrate he did accept that she intended to repay, but that she also attempted, by the device of a "facade of accountability," to hide her guilt.

Next Mr Davies referred me to a number of previous sentences of both this Court and of the Court of Summary Jurisdiction to indicate that the 'tariff' for offences involving amounts of less than say, $10,000, was a fully suspended sentence. Reference was also made to the cases listed in the schedule to *Bird*'s case. In a few of these cases involving sentences of this Court I was provided with the sentencing judge's remarks. I also referred both counsel to a number of cases reported in *Carters Australian Sentencing Digest*. My impression overall in reviewing these past sentences is that for amounts similar to the amount involved in these appeals, the sentences in the Northern Territory are commonly, but not universally, wholly suspended; this appears to be less common in other jurisdictions. However on reading the sentencing remarks made available to me, there are usually factors of some significance stressed by the sentencer to justify a wholly suspended sentence. In all the cases I reviewed, the defendant had pleaded guilty and was remorseful. In some, the offender was young; in others, there was either only a single offence

(as in *Freeman v Pulford*) or two or three offences. In yet others, the offender had given information to the police to assist in bringing other offenders to justice. All that I feel confident about is that in each of these cases there appeared to be sound reasons given for the course taken. There were, true enough, mitigating factors in favour of the appellant in this case; but in this case the appellant was not remorseful or contrite and was not entitled to any special leniency as she had lied on her oath. I will not repeat all of the other considerations, some of which have been mentioned previously and others of which I have not mentioned but are dealt with in the learned magistrate's sentencing remarks. In all of the circumstances I am not persuaded that the sentences imposed in this case were manifestly excessive. It may be that I myself would have imposed different or lighter sentences, but that is not enough. What was to be shown is that the sentencing discretion entrusted to the learned magistrate has miscarried by the imposition of sentences that are so excessive as to be "unreasonable or plainly unjust" so that I might "infer that in some way there has been a failure to properly exercise the discretion which the law reposes in the court of first instance": see *House v The King* (1936) 55 CLR 499 at 505. I do not consider that this has been established.

The appellant has been on bail pending her appeal. The learned magistrate ordered her release on 29 January 1994, ie after having served three months of her sentence. It is appropriate that I vary this order to accord with what was intended. Accordingly, the sentences imposed by the learned magistrate are confirmed and I order that the appellant be released after serving three months of the sentences upon her entering into a recognizance self in the sum of $1000 upon the following conditions:

1. that she be of good behaviour for a period of two years;

2. that she accept the supervision of the Director of Correctional Services for a period of six months and during this period obey all reasonable directions as to reporting, associates, employment and residence.

Save for these orders, the appeal is dismissed.