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

No. JA24 of 1994

IN THE MATTER of the Justices Act

AND IN THE MATTER of an appeal against a sentence imposed by the Court of Summary Jurisdiction at Katherine

BETWEEN:

TONY LIDDY
Appellant

AND:

KEVIN DAVID WINZAR
Respondent

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 8 June 1995)

The appeal

By Notice of Appeal dated 13 July 1994 the appellant appealed, pursuant to s163 of the Justices Act, against a sentence imposed on him by the Court of Summary Jurisdiction at Katherine ("the Court") on 8 July 1994, after he was summarily convicted on one count of stealing and three counts of obtaining cash by deception, contrary to ss210 and 227 respectively of the Criminal Code. The Court sentenced him to 6 months imprisonment; pursuant

to s5(1)(b) of the Criminal Law (Conditional Release of Offenders) Act it directed that the appellant be released after serving 1 month in prison, upon entering into his own recognizance in the sum of $500 to be of good behaviour for a period of 18 months, on condition that he pay $784 (in default 16 days imprisonment) by way of restitution within 10 months. The appeal embraces this entire disposition.

There are 7 grounds of appeal set out in the amended Notice of Appeal, viz:-

> "1. That the sentencing Magistrate placed an inordinate emphasis on the principle of general deterrence.
>
> 2. That the sentence imposed by the sentencing Magistrate was manifestly excessive.
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> 3. That the magistrate gave undue weight to the principle of breach of trust;
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> 4. That the magistrate gave insufficient weight to the principle of remorse;
>
> 5. That the magistrate gave undue weight to the consideration of the Appellant's method of committing the offences charged;
>
> 6. That the magistrate gave insufficient weight to the Appellant's previous good character;
>
> 7. That the magistrate gave insufficient weight to the indirect consequences of conviction upon the Appellant."

The decision in the appeal

On 20 December 1994 after hearing the parties' submissions, I ruled on the appeal as follows:-

> "This is an appeal against sentence imposed by the Court of Summary Jurisdictions sitting at Katherine on 8 July 1994. On that day the court sentenced the appellant, Tony Liddy, to a total of six months imprisonment after convicting him on one count of stealing and three counts of obtaining cash by deception.

> The court ordered that Tony Liddy be released after serving one month in prison on the condition that he enter his own recognizance to be of good behaviour for a period of 18 months and upon a condition that he pay restitution in the sum of $782 within 10 months.
>
> There are seven grounds of appeal which have been argued today and for the moment it suffices to say that, having had the benefit of hearing in great detail both Mr Howse and Mr Carey, respectively counsel for the appellant and for the respondent, I am satisfied that there is no substance in any of the seven grounds of appeal. I will publish reasons for that decision in due course but the order of the court is that the appeal is dismissed and the sentence of the Court of Summary Jurisdiction at Katherine of 8 July 1994 is affirmed."

I now publish reasons for that decision.

The proceedings in the Court

(a) The submissions on penalty

The appellant pleaded guilty to the 4 charges, and admitted the following facts:-

> "- - - the [appellant] was employed as a bookkeeper at the Pine Creek Aboriginal Advancement Association. - - - On [the] long weekend of 29 April 1994 to 2 May 1994, the co-ordinator and 4 executives of the Advancement Association went bush for the weekend from the Kybrook Farm Community, leaving the [appellant] with the keys to their office in case the telephone was needed for emergency.
>
> On Saturday 30 April 1994, the [appellant] took the office keys and went inside the office and removed 3 cheques from the CDEP Wage cheque book, and made them out to 'Cash'; one for $260, and - - - another two for $262. Then [he] persuaded two other signatories to sign for him and persuaded another to forge Carol Smith's signature, so [that] the cheques could be cashed.
>
> The [appellant] then cashed 2 cheques [at] the Pine Creek Shell Garage, and one at the 'Lazy Lizard' Shop, the total amount of the cheques cashed being $784, - - - which the [appellant] spent at the hotel buying bulk beer and wine for himself and co-offenders between Saturday and Monday.

> On the same Saturday evening whilst under the influence, the [appellant] returned to the office and partially filled out another 3 cheques for cash, and another in his own name. The community co-ordinator and the executives returned after the long weekend and discovered the offences. The [appellant] told them he was short of cash.
>
> Police were then notified and the [appellant] attended at the Pine Creek Police Station on Thursday 5th [May] '94, and made admissions to all offences, stating he had spent all the money; that he had no permission to sign or forge or take any cheque from Kybrook.
>
> No money or alcohol was recovered and the Aboriginal Advancement Association then honoured all the cheques used by the [appellant] and co-offenders, and they've requested that the [appellant] repay them, as the money was for other people's wages in the community."

The appellant's prior criminal history was said to have been restricted to offences involving violence or traffic offences. There was one prior offence involving dishonesty; it concerned the unlawful use of a motor vehicle.

Mr Dooley then of counsel for the appellant, in mitigation, canvassed the nature of the offences and the offender's circumstances. His submissions were as follows:-

> "- - - he was employed as the bookkeeper at Pine Creek Advancement Association. He tells me, Your Worship, that he's not sure what his position is there at the moment. He's been living out at Claravale Crossing on the Daly River with the family, something of a dry season outstation. He says that he - - - will be looking to go back to the Kybrook Farm perhaps when the weather turns, and he'll see how he's received then.
>
> - - - it seems that - - - it was the Queen's Birthday long weekend and that he - - - was living in a house. There were 7 people in the house: a married couple and their child, [and] a total of 4 other single adult males.
>
> He said as the weekend approached, he realised he was short of money; that the various company he was keeping at the time were quite enthusiastic about having a big weekend which meant getting hold of money for purchasing alcohol, in the main, and that he had plenty of

supporters, Your Worship, as he formed his ideas to do what he did. And he says it was his idea - - - And he went about executing the plan as Your Worship's heard in some detail.

He says - - - that it was wrong of him to do what he did, and that he's very ashamed of what had happened and he knows that his credibility and standing in the community [has] severely been lowered by this event, and that he's brought shame upon himself for so cynically stealing and deceiving as he's done. And he does say, Your Worship, that he is willing to repay the community which would be, obviously, something the community should be able to arrange fairly easily, as when he works for them on the CDEP program, just by withholding proportion of his income.

He has worked at Kybrook for the past 15 to 16 years, so he's very much rooted to that community, Your Worship, saving except for the periods such as the very moment where he does go to outstations when the weather's as it is now. He says when he's working, he's getting approximately $262 a week, but if he reverts back to being more sort of standard CDEP worker, he'll - probably won't be getting so much.

- - - he's had an education to Year 10 level at Darwin High, and - - - did some studies through Batchelor College to enable him to pick up the skills to enable him to be a bookkeeper. But obviously he's misused those skills over this particular weekend.

Fairly plainly, - - - none of the money was spent on any great necessities. He admits that; it was mainly - - - to - - - make the best of the weekend, and he did of course make admissions to all offences - - - this'll be his one and only escapade of this nature.

It was always - - - pretty well doomed to failure - - - he explained that he was short of money and didn't try to hide it in any great way, - - - he didn't disappear totally. He was on hand to try and explain himself; that he was short of money. Obviously, that excuse didn't wash and the police were called in.

He hasn't certainly wasted the police's time; he made full admissions - - -.

But I'd urge Your Worship to consider in sentencing Mr Liddy that from his record, he's 31, he doesn't seem to be a hard-core thief; I'm sure Your Worship's dealt with people that seem to have - at liberty to constantly try and deceive and rip people off.

- - - his record speaks of somebody who's had troubles in the past, of course, but not of this nature and he's picked up skills in recent times only, which has probably acquainted him with the cheque system and he certainly knew how to go about getting hold of money. But I'd submit that he's not the sort of hard-core con man that Your Worship occasionally would have dealt with.

HIS WORSHIP: It's an offence of dishonesty committed by a person in a position of trust, using that position of trust to perpetrate the dishonesty. He just doesn't come before the court as a person of previous good character, [who] has got no directly relevant priors in relation to dishonesty, but most people in a position of trust who abuse it are in that position as well. So I would think that on the face of it, it's a matter calling for imprisonment.

MR DOOLEY: Well, Your Worship, the other matter I of course address is the actual amount taken; it was, in my submission, an amount pretty well geared toward supplying him and his mates with alcohol to get them through the weekend - $784. - - - He could have, you know, [taken more]; the cheque books were there, there was 3 or 4 days, - - -

- - -

MR DOOLEY: - - - I submit, Your Worship, he - - - put some limits on it to a certain extent. - - -

HIS WORSHIP: But it also shows some criminal cunning in his own mind because he's actually picked amounts which actually correspond to what CDEP amounts are.

MR DOOLEY: Yes, Your Worship, I noted that.

HIS WORSHIP: So he's picked an amount which might avoid being detected, and amounts which wouldn't draw attention to them. If you pick $600 or $1000, some amount which had no relationship to the CDEP cheque book, then someone might have worked out that something funny was going on. He seems to have been quite controlled and sensible in his dishonesty; it seems to be fairly well thought through.

MR DOOLEY: Yes, Your Worship, I think that has to be conceded, - - - those amounts. - - - if Your Worship's considering a period of imprisonment, I'd urge Your Worship to consider that suspending that might be appropriate; him entering a bond with a condition that he pay the money back.

In my submission, Your Worship, - - - it's obviously an offence of some seriousness, but in my submission, it's not an offence that is serious enough to call for immediate imprisonment, and - - - I do submit to Your Worship that, in fact, some form of community service work, in my submission, is probably more appropriate, with the level of money involved and the surrounding circumstances, even though he did abuse obvious trust put in him and we'd certainly concede there was cunning involved.

HIS WORSHIP: There also must be an element of general deterrence in offences of this type as well, particularly amongst communities; that people must realise - - - that you can't rip off your own community and expect to get any light sentences.

- - -

I think there needs to be a fairly strong element of general deterrence in this, as well as a specific deterrence for this defendant.

- - -

I'm thinking of a gaol term of about 5 months, or at least after 1 month, balance suspended on a bond; one of the conditions of the bond is he pays back the money in a certain time. That's what I'm minded to.

- - -

I invite you to address me on that if you want to.

MR DOOLEY: Yes, Your Worship. My submission would be that requiring Mr Liddy to serve a period of immediate imprisonment for an offence of this magnitude would be excessive. I'd submit to Your Worship that - I'm not trying to dissuade Your Worship from imposing a sentence of imprisonment, but he's not been in trouble before for acts of dishonesty, save except for the unlawful use of motor vehicle Your Worship's already referred to.

- - - he's not a hardened conman; he's a man now in his early 30's who's picked up some skills recently which he's abused, - - -

HIS WORSHIP: - - - these offences were committed 2 months ago and there's been no attempt to pay back anything up to now, and that doesn't go to his credit.

MR DOOLEY: - - - He made his full admissions.

Post those admissions, he's gone to the Claravale Crossing and has remained with family at that

outstation, - - - he says he's very embarrassed by what happened, and repentant, so he's somewhat removed himself, Your Worship, from the community which probably would - would obviously have made it difficult for him to - - -.

HIS WORSHIP: I'm sure he's been in receipt of unemployment benefits or something in the last 2 months.

MR DOOLEY: Apparently he's been receiving no income, Your Worship, since the incident. He's gone to the outstation - - -, he's looking to sort of, once a certain period's passed, to try and bring himself back into the Kybrook community where he's lived and worked for some 15 or 16 years, - - - he knows he's not popular there at the moment and he's waiting to go back and try and make another go of it in that community, so presently he's perhaps somewhat ostracised, Your Worship.

And I'd - - - submit to Your Worship that, of course, that's also something of a penalty; that he's away from his normal community.

- - - he's instructed me that - - - he is very ashamed about what he's done, embarrassed by it. I was hoping that he might want to address Your Worship to that effect - - - I don't think he feels confident that he can express himself, Your Worship, in these surroundings.

- - - you're dealing with a man who does recognise that he's done the wrong thing and - - - he says to me that he won't do it again. And I'd submit - - - that Your Worship would have some faith in that, with his record showing that he's not been prone to this sort of criminal behaviour before.

- - - Your Worship could put him on a bond for a lengthy period of time and it'd be, - - - a quite strong test of him; make sure that if he has any thoughts about doing this again, he'd certainly be going to gaol the next occasion without any qualms."
(emphasis mine)

(b) The Court's remarks on sentence

When sentencing the appellant the Court said:-

"You've pleaded guilty to 4 serious charges involving a serious dishonesty.

You were employed as a bookkeeper at the Pine Creek Aboriginal Advancement Association and, during a long

weekend earlier this year, you used the opportunity of being given a key to those premises and the position of trust that you were in to enter the premises, removed 3 cheques and you then set about a course of conduct involving others, whereby you arranged for some signatures on those cheques and another signature to be forged.

You then by deception presented those cheques and obtained cash on three separate occasions and with three separate cheques, and on two occasions you received $262, on the other occasion, $260; a total of $784, which you stole from your employer.

You were in a position of trust; you abused that trust. The offences also showed that it was a well-planned operation. It clearly wasn't something which was a spur of the moment. You filled out the cheques for amounts which approximated CDEP payments. They were cheques drawn on the CDEP account and it was a planned deception and, clearly, you hoped to avoid detection. As it turned out you were detected and once you were detected, you did make full admissions and were fully co-operative, and I give you credit for that.

The reason for the taking of the money was purely greed; there was no need involved. It was purely for the purpose of having a big party involving alcohol and you used the money to buy alcohol, and all the money was spent and all the alcohol was consumed.

You have a number of court appearances going back to 1983. You only have one prior for a dishonesty type offence, which was an unlawful use of motor vehicle in April of last year.

The matters are serious. They are breaches of trust. You were held in a position of trust; you stole from your employer and, as such, you also stole from your Aboriginal community of which you were a member and a trusted member at that stage. It was a planned stealing and one which you were hoping, clearly, to avoid detection on. It was not one which was necessarily fraught with failure, but you were detected quickly.

There has been no restitution made to date and no attempt has been made to make any payments. I'm told that you have not been employed or receiving any income since the incident and I take that into account, but clearly you wouldn't have been in a position to make restitution at this stage.

Also it's clear your position with your employer is uncertain, and it would not be surprising if your employer had lost some faith in you as an employee.

> They are serious matters; they are also matters which, in addition to needing a deterrence aspect for you, require an element of general deterrence [so] that other members of the community, particularly people in positions of trust, don't abuse that trust and steal money from their employers for their own purposes.
>
> In the end result, I consider that the seriousness of the offences justify a term of imprisonment. In relation to your personal particulars, there is nothing particular in your favour in relation to your background. You certainly don't come before the court as a person with a clear record, but you also don't come before the court as a person who is set on a path of dishonesty.
>
> In the end result, - - - [for the offences of one count of stealing and three counts of obtaining cash by deception] you're convicted and sentenced to be imprisoned for 6 months with hard labour, and I direct that you be released after serving 1 month upon entering a bond with the sum of $500 own recognizance to be of good behaviour for 18 months; further condition that you pay $784 by way of restitution to the Clerk of Courts (in default, 16 days) within 10 months, with such sums to be paid out to Pine Creek Aboriginal Advancement Association." (emphasis mine)

The appellant's submissions on appeal

Mr Howse of counsel for the appellant submitted that the "nub" of this appeal was ground 2, that the sentence was manifestly excessive. Accordingly, he dealt with the grounds of appeal in the following order, which I follow: 2, 1, 3, 4, 5, 6 and 7.

Ground 2: sentence manifestly excessive

Mr Howse submitted that the sentence was so excessive in the circumstances that there must have been an error.

In support, he relied on statistical information which establishes a sentencing tariff for offences involving Social Security fraud. I note that the statistical analysis did not

distinguish the cases of 'need' from cases of 'greed'; further, this was not a case of Social Security fraud, a well-known category for sentencing purposes and one which does not involve the breach of trust which lies at the heart of the appellant's offences.

Mr Howse submitted that a tariff could not be established for the offences for which the appellant had been convicted because "the [statistical] sample is just too small". I accept that. However, he submitted that notwithstanding that Social Security fraud does not involve an element of breach of trust, the sentencing tariff established by the statistical information was relevant to this case. To establish this he submitted that absent the breach of trust -

> "the other [elements] of [Social Security fraud] are on all fours with the crimes that [were] committed by the appellant in this case"

He submitted that the Court should "accept that - - - the breach of trust was not something which ought to have been [given] - - - as a matter of law, great weight."

I consider reliance on sentencing in Social Security fraud offences was misplaced; for present purposes, they are misleading.

Ground 1: inordinate weight given to need for general deterrence

Mr Howse submitted that the rationale and law on general deterrence in sentencing is set out in Fox and Frieberg's "Sentencing: State and Federal Law in Victoria" at pp446-447, viz:-

> "The need for deterrence, as with retribution, helps define the lower limits of a penalty. Too great a leniency will amount to an erroneous exercise of the sentencing discretion, first because it represents a failure of the court's primary duty, the protection of the community and, secondly, because it is thought to destroy the public's confidence in law and order.
>
> - - -
>
> If the court considers that the deterrent requirements of a sentence have been sufficiently met, for instance because the fact of the conviction and sentence are widely known in a small community, a reduction of the sentence may be allowed."
> (emphasis mine)

Mr Howse relied on two comments by the Court to establish this ground. The first occurred in an exchange between the Court and Mr Dooley during submissions in mitigation, viz:-

> "There must be an element of general deterrence in offences of this type as well, particularly amongst communities [where] people must realise that the message must be sent out to these communities that you can't rip off your own community and expect to get any light sentences."
> (emphasis mine)

The second comment was made by the Court when sentencing (p10), viz:-

> "[These] are serious matters; they are also matters which, in addition to needing a deterrence aspect to you, require an element of general deterrence [so] that other members of the community, particularly people in positions of trust, don't abuse that trust and steal money from their employers for their own purposes."
> (emphasis mine)

Mr Howse submitted that the 2 comments clearly showed

> "that the principle of general deterrence weighed very heavily in the [Court's] mind as a peg to hang [its] hat on, for a sentence of imprisonment."

He submitted that the Court had not properly taken account of the fact that the appellant lived in a small community where his apprehension, conviction and punishment were widely known. Consequently, the "full vigour" of general deterrence did not have to be applied; the Court should have given "far less weight" in these circumstances to general deterrence. Mr Howse conceded that even in those circumstances the need for general deterrence may still require a defendant to serve a term of actual imprisonment; however, he submitted that the circumstances of this case did not call for such a disposition.

In summary, on ground (1), Mr Howse submitted that the Court had "overstressed" the principle of general deterrence when sentencing.

Ground 3: undue weight to factor of breach of trust

Mr Howse submitted that the Court erred in giving undue weight to the factor of breach of trust. He submitted that a Court must consider:

> "In the first place the category of trust in which the [appellant] might be [placed in], and [then] move [on to consider] what weight ought to be given to that factor [in sentencing]."

Mr Howse relied in support on *R v Wright (No.2)* [1968] VR 174 at 181; in that case the accused was a member of the Police Force, and the Full Court considered that the trial judge "was entitled to take that factor into account in determining the gravity of the offence and the appropriate term of the sentence."

Mr Howse conceded that the appellant, as a bookkeeper, fell into the category of occupations that constitute "a position

of trust". However, he submitted that "the degree of trust - - - which the appellant - - - held is not as significant as some other categories [of employment]", such as "bank managers, solicitors [and] police officers". He submitted that the appellant was in a "very low category" of trust, and that the Court had not taken this factor into account, in sentencing.

Mr Howse relied on an observation by the Court in an exchange with counsel, characterizing the offence as "an offence of dishonesty committed by a person in a position of trust, using that position of trust to perpetrate the dishonesty"; and the third passage emphasized at p10.

Ground 4: insufficient weight given to appellant's remorse

Mr Howse submitted that "it is difficult to see that any weight was placed on [the appellant's remorse]". He submitted that 4 matters had been put to the Court which suggested the appellant was very remorseful:-

1) The appellant had conveyed to Mr Dooley that he was "very remorseful" for what he had done, and he had instructed Mr Dooley to put that to the Court on his behalf, as he was "unable to express [it] himself in [the Court] surroundings" (p8);

(2) The appellant made full admissions of guilt, early in the Police investigations;

(3) The appellant left the community where he was working because he was "very embarrassed" by what he had done (p8); and

(4) The appellant had not been receiving any income since the incident and therefore he had not been able to make restitution.

Mr Howse submitted that the Court's references to the matters of contrition in its sentencing remarks, in particular its restricted reference (p9) to the appellant having made "full admissions" and being "fully co-operative" with the authorities, show that it had not taken into account the other matters of remorse (1) and (3) above which had been put to it in mitigation.

Mr Howse conceded that the Court must be "deemed to know the law", "is deemed to have considered the matters put to [it] by counsel, unless it manifestly appears [that it did not turn [its] mind to them", and "is not required to deal with each and every one of the submissions - - - put to it, [and] is deemed to have taken them into account and deemed to have given them appropriate weight, unless it can be shown that he did not". However, he submitted that the Court "specifically omitted to turn [its] mind to [the factor of remorse]" and in so doing, erred.

In support, he relied on *R v Neal* (1982) 42 ALR 609, and the authorities therein cited. At p617 Murphy J in listing and dealing with the mitigating factors which should have been taken into account, said:-

> "Apology: Through his counsel, Mr Neal tendered his apology to Mr and Mrs Collins in the Magistrate's Court but this was not referred to by the magistrate nor by the Court of Criminal Appeal. Contrition, repentance and remorse after the offence are mitigating factors, leading in a proper case to some, perhaps considerable, reduction of the normal sentence: *(Harris v R* [1967) SASR 316; also *R v Tiddy* [1969] SASR 575; *Darwin v Samuels* (1971) SASR 411 at 423; *Datson v R*, Supreme Court of Western Australia (1972, unreported)). This

> factor of contrition is generally given insufficient weight in sentencing in Australia." (emphasis mine)

Ground 5: undue weight given to appellant's 'modus operandi'

Mr Howse conceded that it is an 'aggravating circumstance' that a crime is carefully planned and executed. See *R v Campbell* [1970] VR 120 at 129. However, he submitted that here the evidence established that the crimes, although showing a certain amount of sly cunning, did not fall into the that category. Rather, there was -

> "- - - very poor planning, [where the appellant] simply [buckled] under pressure from his friends, organised the forgery of three cheques to cash them on a long weekend to obtain some grog, and [was subsequently] discovered very quickly; [which] suggests [that this case falls] very much in the low range of good planning and good execution - - - [the] crime - - - was bound [from the outset] to be discovered because of the fact that these [CDEP] cheques were not made out to named beneficiaries [but] to cash."

Accordingly, he submitted that the evidence precluded the Court's finding (p9) that:-

> "The offences also showed that it was a well-planned operation. It clearly wasn't something which was a spur of the moment. You filled out the cheques for amounts which approximated CDEP payments. They were cheques drawn on the CDEP account and it was a planned deception and, clearly, you hoped to avoid detection."

Ground 6: insufficient weight to previous good character

Mr Howse submitted that the appellant's previous good character should have been given greater weight, particularly in light of the fact that -

> "- - - [the appellant] is 31 years [of age] - - - [and is not] a hard-core thief or person who constantly tries to deceive and rip people off".

He noted that the appellant's prior criminal history revealed only one relevant criminal offence involving dishonesty, the remainder of his offences being of a "wholly different character."

In support, Mr Howse relied on *Smith* (1982) 7 A Crim R 437, per Starke J at pp442-443:-

> "Two matters which the learned judge referred to and which, in my judgment, are of essential importance are, firstly, the good character of the applicant. He had reached mature years and indeed middle age without ever falling foul of the law. He had, the evidence reveals, lived an industrious life and in recent years branched out on his own. He had raised a family. In my opinion, in circumstances of this nature, a convicted person is entitled to call in aid his good character and is entitled to have the court give it the greatest weight. What weight it will have depends, of course, on the character of the offence committed. In some cases, like armed robberies and so on, the fact of good character would have very little weight at all. In other cases, such as this, where a man has lived an honest life and has found himself in circumstances perhaps through no fault of his own and fell to temptation, the situation is quite different. Indeed the old First Offenders Act 1958 (Eng.) rather indicated that the court should not, except in exceptional circumstances, make a custodial order against a man who had reached maturity and who had led a blameless life. Of course, there must be many qualifications to that rule, but it is, I think, one that must be borne in mind, and in this case, in my opinion, must receive the greatest possible weight.
>
> - - -
>
> I also bear in mind that the impact of a prison sentence on a person of good character, and not of the criminal class, such as the applicant, is a very much more severe penalty than it is for a man of his age who has spent a good time of his life in gaol and, no doubt, he would do his term in prison much harder than others might". (emphasis mine)

In summary, Mr Howse submitted:-

> "I am putting that although good character is not [an] infinitely divisible entity, this much can be said: this is a man who has been in trouble with courts for offences which include assault, which on one occasion

> had at least attracted a suspended sentence. However as far as his disposition towards dishonesty is concerned, and in particular his disposition to the type of dishonesty whereby somebody actually appropriates money or property belonging to somebody else with whom he is in a position of trust, [it] is not a part of his character."

I observe that while this last point may be accepted, it is a distortion of reality to say that the appellant has a previous good character, akin to that of the applicant in *Smith* (supra).

Ground 7: insufficient weight to consequences of conviction for the appellant

Mr Howse conceded that the Court had considered (at p10) some of the potential indirect consequences of the conviction on the appellant, viz:-

> "Also it's clear your position with your employer is uncertain, and it would not be surprising if your employer had lost some faith in you as an employee."

However, he submitted that the Court did not take into account that the appellant had not earned anything since the date of the offences; and that the appellant would have great difficulty in gaining employment of a similar nature in any Aboriginal community, due to his own community's links with other communities. This would inevitably result in the appellant having wasted his achievements in completing studies at Batchelor College. This latter indirect consequence, he submitted, was "different in degree - - - [and] kind" from the usual case, due to the cultural issues involved in the community, and was particularly significant in this case.

The respondent's submissions

Mr Carey argued the grounds of appeal in order of 1,3,4,5,6,7 and 2. He submitted that all the grounds of appeal recognized that the Court had taken into account the matters therein set out; each ground attacked the weight the Court had given those matters when sentencing. The appellant had to demonstrate error by the Court in assessing that weight, to establish that its sentencing discretion had miscarried; see the authorities cited in *Salmon v Chute* (1994) 94 NTR 1 at 24.

As to demonstrating that error Mr Carey observed that a Court's remarks on sentence should not be treated on appeal as though they were a reasoned judgment; see *R v Davey* (1980) 50 FLR 57 at 66, per Muirhead J. He submitted that the appellant's general approach appeared to assume that they should be; and that all the grounds must fail, for the following reasons.

Ground 1: inordinate weight given to need for general deterrence

Mr Carey submitted that the Court had not given inordinate weight to the need for general deterrence. In support, he submitted:

(1) Exchanges between counsel and the Court in the course of submissions, on which the appellant sought to rely at p12, must be viewed in a different light to stated reasons for sentence. It is the latter to which an appeal must be directed.

(2) In an exchange with defence counsel, the Court had observed:-

"There also must be an element of general deterrence in offences of this type as well, particularly amongst communities, that people must realise, that the message must be sent out to those communities, that you can't rip off your own community and expect to get any light sentences."

Ground 3: undue weight to factor of breach of trust

Mr Carey submitted -

"- - - in an offence of dishonesty committed by a person in this situation the breach of trust really is the crux of the matter. It's that aspect which distinguishes this offence from most other offences of stealing or dishonesty.

There's nothing in the evidence in this case to suggest that the appellant had, prior to the time of commission of the subject offences, been entrusted with the keys to - - - these particular premises by the employer; and from the facts it can be seen that it only happened on this occasion because the co-ordinator and four executives of the organisation left to go bush for the long weekend. And the inference is capable of being drawn that this is the only occasion on which he was trusted in that way, and that he then betrayed that trust. To that extent, it could be seen that he was in perhaps a higher position of trust vis-a-vis the employer over this weekend than he had been previously - - - .

And there's much in the remarks of the sentencing magistrate to show that he considered stealing in a position of trust to be a much more serious - - - form of the offence set out in section 210 of the Code and, in my submission, he is quite correct. - - - There's nothing in the remarks to indicate that he gave it other than its due weight in that respect and, in my submission, ground [3 must fail]."

Ground 4: insufficient weight given to appellant's remorse

Mr Carey submitted that the Court clearly considered that the objective circumstances of the offences outweighed the subjective circumstances of the appellant in this case. It was entitled to take that view. This diminished the weight that

should be given to the factor of remorse, though the Court had given the appellant credit for co-operating with the authorities and making full admissions; these were practical demonstrations of contrition.

Ground 5: undue weight given to appellant's 'modus operandi'

Mr Carey submitted as follows. The Court had not given undue weight to the appellant's method of committing the offences charged. The evidence clearly established that the method adopted by the appellant showed "some criminal cunning" in planning and execution, as his Worship had observed (p6) in an exchange, and as defence counsel had then conceded (pp7,8). It was a planned stealing "not necessarily fraught with failure". On this point Mr Carey submitted as follows:-

> "The facts that the cheques were made out to "cash" may or may not - - - have led to [the appellant's] eventual discovery. - - - the fact that the cheques were made out to "cash" says nothing about how the butt is made out; and no doubt it's the butt that would come to the notice of the officials in the organisation.
>
> As Your Honour's already noted it wasn't a question of buckling to pressure from his friends and in that respect also the transcript seems to indicate out of defence counsel's own mouth that this was a matter that was had in mind perhaps for some days leading up to the weekend in question, and not simply on the Saturday morning after the key came into [his] possession. - - - Mr Dooley says to the magistrate [pp4,5]:
>
> > "[The appellant] said as the weekend approached, he realised he was short of money; that the various company he was keeping at the time were quite enthusiastic about having a big weekend which meant getting hold of money for purchasing alcohol, in the main, and that he had plenty of supporters - - - as he formed his ideas to do what he did. And he says it was his idea, Your Worship. And he went

about executing the plan as Your Worship's heard in some detail."

> And he goes on to say: 'It was his idea'. But the telling part of that is 'that as the weekend approached', and it does appear that this is a matter that he had thought about, not simply on Saturday morning but perhaps some days prior to the weekend.
>
> So in that respect the planning aspect probably attains a little more significance than might at first appear."

In summary, Mr Carey submitted that the Court properly took into account the modus operandi which the appellant had used, as it was entitled to do; and nothing in its reasons for decision indicate that this factor was given disproportionate weight.

Mr Carey referred to *R v Campbell* (supra) at p129 where the Full Court noted as an aggravating factor that "the crime was very carefully and deliberately planned and executed."

Ground 6: insufficient weight to previous good character

Mr Carey submitted that it was quite clear that the appellant came before the Court as a person not of good character, in that his prior criminal history showed that he had a disregard for the law and the authority of the Court.

He submitted that the offences, involving a breach of trust, were intrinsically serious enough to militate against leniency being shown for any previous good character. Nevertheless, he noted that the Court took the appellant's prior criminal history into account in the following manner (p10):

> "You certainly don't come before the Court as a person with a clear record but you also don't come before the Court as a person who is set on a path of dishonesty."

He submitted that in approaching the factor in this way the Court gave more credit to the appellant's character than was warranted in the circumstances.

Ground 7: insufficient weight to consequences of conviction for the appellant

Mr Carey submitted that the appellant clearly had "some expectations of being accepted back into Kybrook community, following a cooling-off period", in light of the following submission put by Mr Dooley to the Court:-

> (p4) "[The appellant] says he is still - - - looking to go back to the Kybrook Farm perhaps when the weather turns, and he'll see how he's received then. - - -
>
> - - -
>
> He has worked at Kybrook for the past 15 to 16 years, so he's very much rooted to that community, - - - except for the periods such as the very moment where he does go to outstations, when the weather's as it is now."

Mr Carey submitted that living at Kybrook Farm was not a "closed book to [the appellant] at all". It appeared that he generally left that community for outstations, at certain times of the year. Accordingly, "he clearly has some expectations and they're probably realistic, given the community attitude, of getting back and actually becoming employed again in the community."

Ground 2: sentence manifestly excessive

Mr Carey submitted that the sentence was at the lower end of the permissible range of sentences. He submitted that 3 matters should be borne in mind when assessing this ground of appeal:

(1) although the four offences were dealt with summarily, they each "carry a maximum of 7 years imprisonment", although the Court could not impose more than 2 years - see *Maynard v O'Brien* (1991) 57 A Crim R 1 at 6;

(2) the well-established principles governing an appeal against sentence - see *House v R* (1936) 55 CLR 499, at 503, 505 and 507 and *Cranssen v R* (1936) 55 CLR 509 at 519-520;

(3) the sentencing principles enunciated in *R v Bird* (1988) 91 FLR 116 at 131-2, in cases of breach of trust, viz:-

> "In general, unless the circumstances are very exceptional or the amount of money involved is small, a sentence of immediate imprisonment is the usual and expected punishment in such cases. The sentence, and that part of it which is directed to be served, must be sufficiently substantial to indicate to the public the gravity of the particular offence. While the amount of money taken is not the only determinant of the length of sentence, it is a useful practical indicator. Where very large sums of money are taken, as here, a lengthy sentence of imprisonment is warranted. Other factors being equal, 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 The Queen* (1984) 154 CLR 606 at 610-611. Apart from the amount involved, other factors to be considered when imposing sentence include: the period over which the criminal enterprise was carried on - in this case a little over two years the quality and degree of trust reposed in the accused by his employer, including the accused's position in the employer's organisation; the use to which the accused put the moneys - in this case mainly gambling; the impact of the offence and sentence upon the accused's fellow-employees and the public: see the observations in *R v Stevens* (unreported, Court of Criminal Appeal (Vic) 3 February 1976) (at 136) and *R v*

Green (unreported, Court of Criminal Appeal (WA), 13 October 1978) (at 136); where relevant, the impact upon public confidence in the employer; the effect of the defalcation upon the employer; the effect of the sentence upon the accused; the history and personal circumstances of the accused and any matters of mitigation personal to him. Where the breach of trust is serious it is usually not appropriate to suspend any part of the sentence."

In light of these considerations, Mr Carey submitted:-

(1) The length of the effective sentence could not be said to be manifestly excessive whether it was viewed "in a vacuum or [in light of] the [appellant's] prior criminal history".

(2) The appellant bore a forensic and legal onus to provide relevant statistical information, if available, to establish a tariff, to establish that the sentence was manifestly excessive. The statistical information supplied about sentencing for Social Security fraud was not relevant, for 2 reasons:

    (a) Social Security fraud does not involve a breach of trust, a factor which distinguishes such cases from this case; and

    (b) the sentencing regime under the Crimes Act (C'th) for such federal offences is very different in nature to the regime under the Code.

In the absence of relevant statistical information on 'breach of trust' sentencing cases the Court could not conclude that the sentence was manifestly excessive.

(3) It is the sentence which is the deterrent factor; it is not the community's knowledge of the offender being apprehended, convicted and sentenced.

(4) The degree of trust breached in this case was a high category, not a "very low category" as the appellant submitted. Mr Carey submitted that on the -

> "particular weekend [in question the appellant] was in fact in a much higher category of breach of trust than he was probably at any other time during his employment because the senior executives had left town and entrusted to him the key. The facts before the magistrate indicated that that was on the basis that the phone may have been needed for some emergency for the need of the community, and it's the trust in that situation that he breached."

Conclusions on the appeal

The general principles applicable to appeals against sentence are set out in *Salmon v Chute* (supra) at p24, and in the authorities there cited. The appellant must show that the exercise of the sentencing discretion has miscarried. All 7 grounds of appeal relied on a close construction of the Court's sentencing remarks, and of exchanges between the Court and defence counsel. As to this approach I bear in mind the cautionary observations by Muirhead J in *R v Davey* (supra) which apply here, mutatis mutandis:-

> "A Judge's remarks on sentence will seldom reveal all the matters he takes into consideration - - - Remarks on sentence should not be reviewed on appeal as though they are a reserved judgment. They are frequently made ex

> tempore and in conversational manner, but generally only after anxious thought." (emphasis mine)

The leading authority in this jurisdiction on sentencing for dishonesty offences involving breach of trust is *R v Bird* (supra); see pp25-6.

In my opinion, on a fair reading of the Court's sentencing remarks (at pp9-10), bearing in mind the parties' submissions (at pp10-19 and 19-27) and the approach set out in *R v Bird* (supra) at pp24-5 above, none of the grounds of appeal 1 to 7 inclusive have been made out.

I consider that the Court gave consideration, and appropriate weight, to the relevant factors of breach of trust, remorse, the method used in committing the offences, the appellant's previous character and the indirect consequences of the convictions for the appellant. It rightly had regard to the need for general deterrence, and did not give it undue weight.

As to ground 2 of the appeal, I note the observations in *R v Bird* (supra), the objective circumstances of this case and the subjective circumstances of the appellant; I accept Mr Carey's submission that the sentence itself is not so unreasonable as to manifest a demonstrable error. I should add that it is desirable that an appellant provide the Court with sufficient relevant statistical information, if available, when it is contended that a sentence for a common offence is "manifestly excessive". However, in this case, no such relevant statistical information appears to have been available. I accept Mr Carey's submission that Social Security fraud is a crime clearly distinguishable from the present offences, in that it does not involve a breach of trust. I

consider that the appellant was not in a "low category" of trust at the time he committed the offences, which were crimes of greed. As none of the grounds of appeal have been established, the appeal against sentence must be dismissed.

These are the reasons the appeal was dismissed on 28 December 1994, and the sentencing disposition of 8 July 1994 affirmed.