COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***HMTQ v. Reid***,
2004 YKCA 4

Date: 20040121
Docket: YU00507

Between:

Her Majesty the Queen

Appellant

And

Wendy Reid

Respondent

Before: The Honourable Mr. Justice Hall
The Honourable Mr. Justice Low
The Honourable Mr. Justice Lowry

Oral Reasons for Judgment

K. Drolet — Counsel for the (Crown) Appellant

S. Wellman — Counsel for the Respondent

Place and Date: Vancouver, British Columbia
January 21, 2004

[1] **HALL, J.A.**: The Crown appeals from a sentence imposed in the Territorial Court of the Yukon Territory on 11 September 2003. The sentence imposed was an 18 months conditional sentence followed by two years of probation. The sentence incorporated terms relating to restitution and it was apparently contemplated that some restitution might take place before the end of 2003. However, I gather from what we have been advised by counsel, that to the present time no restitution has been made to the victim of the offence.

[2] The respondent, a woman now in her middle 30's, was for many years employed by a company that ran a small chain of food stores in the Whitehorse area. In a period of approximately three years between 1998 and the end of 2001, the respondent, who at the material time was a head cashier at one of the stores, abstracted from the funds of her employer the sum of approximately $212,000. This substantial theft came to light as a result of what has been termed a "due diligence" examination that occurred in connection with a possible sale of the enterprise. It appears that the respondent in her position as head cashier at the end of the working day would gather up the receipts of the day's sales from other cashiers and would then prepare the documentation necessary for depositing the sums in the bank. It appears

that the system in effect at the store did not contain a methodology for comparing the tapes of the sales made each day with the bank deposits for that day. It was only when the above-noted examination occurred that an attempted reconciliation of relevant documentation led to the disclosure of discrepancies which uncovered the theft. The evidence indicates that there occurred 277 separate acts of theft over the course of three and a half years. The average amount of money wrongfully taken on each occasion by the respondent was in the order of about $750. The pattern of the thefts was an increasing one over the time period covered by the indictment.

[3] This was not a large company. The statement filed on behalf of the proprietor at the sentence proceedings indicated that the activity of the respondent was a threat to the viability of the company and also obviously a threat to the continued employment of many people working in this enterprise. Although the evidence uncovered in the investigation, including evidence of the spending patterns of the respondent and her husband, appeared to be strongly indicative of guilt, the respondent has never clearly acknowledged her responsibility for this crime. A plea of guilty was entered by counsel, apparently with the consent of the respondent. However, after the entry of the plea she

appeared to resile from what had been done on her behalf by her counsel. She made efforts both at the trial court and in the Supreme Court of the Yukon to have the plea withdrawn. These efforts were unsuccessful. Between the time of plea and sentence she spent approximately three months in custody and the sentencing judge treated this as a period of six months incarceration.

[4] During the period covered by the thefts, the respondent was residing with her husband in the Whitehorse area. A considerable amount of money was spent by the couple during this time on expensive items including considerable travel. It appears all the funds stolen have been expended. Perhaps in part as a result of these charges, the couple have separated. At the time of sentence the respondent was not residing with her husband. When imposing sentence, the territorial court judge suggested that there might exist some moral responsibility on the part of the husband to consider that he should assist his wife in making a measure of restitution to the victim but I gather nothing of that sort has occurred and there may be scant hope of it occurring. In light of what has occurred over the time since the discovery of the theft or, perhaps more properly speaking, what has not occurred, it appears to me that there is only the most minimal

hope that there will be any restitution made to the victim of these thefts.

[5] Following the imposition of the conditional sentence on 11 September 2003, the respondent has been under a form of house arrest. She breached this on one occasion and served a month in custody. Pursuant to the direction of the court at the time of imposition of sentence in September, there was a hearing held before the judge of the territorial court in December to determine whether restitution had occurred to any extent. When it transpired that there had been no restitution, the judge ordered that a further period be extended for this to occur to the fall of 2004. As I observed, given what has to date happened, it seems to me not at all likely that there is any realistic hope of restitution in this case.

[6] The Crown submits the sentence imposed is inadequate. It argues that the learned trial judge erred in principle in imposing this sentence. The Crown argues that the trial judge also erred when he suggested that there has been an indication by the B.C. Court of Appeal that deterrence is not a guiding principle in these cases. It is argued that he further erred when, having found no mitigating circumstances and acknowledging that only in cases where there are unusual or

mitigating circumstances exist, will imprisonment be avoided for this sort of offence, he nonetheless imposed a conditional sentence plus probation.

[7] A leading case of recent vintage from the B.C. Court of Appeal concerning sentences in cases like this is the case of ***R. v. Khan***, [2002] B.C.J. No. 2950. In that case, the accused Khan planned and carried out a large scale fraud over a period of 14 months. This crime had a serious effect on his employer and a number of investors. A co-accused of Khan who had somewhat less involvement in the scheme was sentenced to two years less a day. The appellant Khan was sentenced to three years imprisonment. Both individuals appealed. The co-accused argued that he should have been given a conditional sentence. Khan argued his sentence should not be different from his co-accused. Both appeals were dismissed. The Court said that the differential in sentence was justified because Khan was more deeply involved in the fraud than was his co-accused. It was found the sentence imposed on Khan was fit. Esson J.A. giving the judgment of the Court said this about this type of case:

> [49] It is clear that no category of offence is excluded from the conditional sentence regime: see Proulx, [2000] 1 S.C.R. 61 at p. 501. Specifically, a conditional sentence is a possible sentence in a fraud case, even with

respect to a large scale fraud: see Bunn, [2000] 1 S.C.R. 183.

[50] However, it is also clear that certain offences will usually lead to custodial sentences. As expressed by Lamer C.J.C. in Proulx, at p. 494:

> [T]here may be circumstances in which the need for deterrence will warrant incarceration. This will depend in part on whether the offence is one in which the effects of incarceration are likely to have a real deterrent effect.

[51] This court has said repeatedly that general deterrence is central to the sentencing process in cases involving large scale frauds with serious consequences for the victims: see: McEachern, Bertram and Wood, Gray and Holden, supra. Importantly, the court has said the same thing since the introduction of the conditional sentencing regime. Conditional sentences have been rejected in large scale fraud cases such as Pierce (1997), 32 O.R. (3d) 321; Ruhland, [1998] O.J. No. 781, and commented on adversely in the leading Ontario case dealing with conditional sentences, R. v. Wismayer (1997), 115 C.C.C. (3d) 18 (Ont. C.A.)

[52] In Pierce, Finlayson, J.A. observed, at p. 40:

> I would... refuse the application to permit the appellant to serve the sentence in the community. The abuse of a position of trust or authority in relation to a victim is an express aggravating circumstance set out in the sentencing guidelines under s. 718.2. This factor has traditionally drawn a severe custodial term even with first offenders. [Emphasis added.]

[53] In Wismayer, Rosenberg J.A. said, at p. 38:

> General deterrence, as the principal objective animating the refusal to impose a conditional sentence, should be reserved

> for those offences that are likely to be affected by a general deterrent effect. Large scale well-planned fraud by persons in positions of trust, such as the accused in R. v. Pierce, would seem to be one of those offences.

[8] The case of ***R. v. Pierce***, [1997] 32 O.R. (3d) 321 was referred to in ***Khan***. In that case the accused, a well-educated woman, was convicted of defrauding her employer of approximately $270,000. She was sentenced to 21 months in prison. She appealed, arguing that she should be allowed to serve the sentence as a conditional sentence in the community. The court, while recognizing that conditional sentences as mandated by Parliament required the courts to be imaginative in structuring sentences less restrictive of the liberty of persons sentenced, went on to say as follows:

> Our courts have routinely recognized this reality when sentencing offenders who engage in crimes of this nature and consequently have emphasized that the paramount objective is the deterrent effect which the sentence will have on others. In this regard it should be emphasized that breach of trust or authority in relation to a victim is an express aggravating circumstance in the newly enacted s. 718.2 of the Code.
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> In R. v. McEachern (1978), 42 C.C.C. (2d) 189, this court considered the fitness of a suspended sentence with an order to perform 240 hours of community service and to make restitution which was imposed upon an assistant bank manager with an unblemished past who was convicted of stealing $77,000 from his employer. In increasing the sentence to 18 months' imprisonment, this court

reiterated the longstanding objective in sentencing offenders who have committed crimes of this nature. It stated at p. 191:

> As an assistant manager of a bank the respondent was in a position of trust. It has long been established that the most important principle in sentencing a person who holds a position of trust is that of general deterrence. The offences were serious and involved a large sum of money [$77,000]. They were concealed by the respondent until they were detected by the bank.
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> In our opinion, the gravity of the offences called for the imposition of a custodial term, and there were no exceptional circumstances which would justify a lesser punishment. The trial Judge placed too much emphasis on restitution, and on community service work as an alternative to imprisonment, and did not attach sufficient importance to general deterrence. The public interest requires that it be made very clear to one and all that in the absence of exceptional circumstances a person holding a position of trust who steals from his employer must expect a term of imprisonment.

What the authorities make clear is that the purpose of incarcerating these offenders is not to protect the community from any danger posed by the particular offender, but to protect the community from the danger posed by those who may be inclined to engage in similar conduct. In the context of crimes of dishonesty, and particularly those involving a breach of trust, for the purposes of resolving the issue of whether "serving the sentence in the community would . . . endanger the safety of the community", the risk of endangering the safety of the community must not only be measured by an assessment of the danger which the particular offender may pose if permitted to serve the sentence in the community. The risk must also be measured by an assessment of the danger which others may pose if the offender is permitted to serve the sentence in the community. The point was succinctly stated by Lamer J. sitting as a member of the Quebec Superior Court in R. v. Viger (unreported) as cited in R. v.

> Cossette-Trudel (1979), 52 C.C.C. (2d) 352 at p. 360, 11 C.R. (3d) 1 (Q.S.P.):
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> > There will also be a danger to the community if the sentence imposed is not of a nature to deter others from conduct analogous to that . . . of the accused.
>
> (Emphasis in original)
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> Clear recognition of the need to consider the risk posed by others when applying s. 742.1 is found in the sentencing decision of Hill J. of the General Division in R. v. Wallace, a judgment of the Ontario Court (General Division) released December 6, 1996. In declining to impose a conditional sentence on an accused convicted of importing a narcotic (marihuana), Hill J. stated at p. 8:
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> > I am inclined to the view that the use of the terminology "would not endanger the safety of the community", as used in s. 742.1(b) of the Code, includes both the notion of risk from the offender himself or herself, and, endangerment of the community in the broader sense of dilution of the general deterrence principle to the point of eliminating any deterrent warning to like-minded individuals considering commission of the offence in question. That a safe community is advanced by the deterrence of others from committing the offence in question is clear, in my view, from a reading of s. 718 itself.

[9] In a case decided in this Court in 1998, ***R. v. Hoy***, [1998] B.C.J. No. 1649 Chief Justice McEachern, in dismissing the sentence appeal of an individual who had stolen approximately $370,000 over a period of 18 months from clients connected with his business and was sentenced to three years imprisonment, observed that "this is an offence where there

may be more value or usefulness in the principle of general deterrence than in many other types of offences".

[10] In his Reasons for Judgment at paras. 26 and 27 the sentencing judge appears to indicate that the B.C. case of ***R. v. Sweeney*** decided in 1992 somehow altered what was articulated in a case decided in 1996, ***R. v. Johnson*** (1996), 112 C.C.C. (3d) 225 (B.C.C.A.). ***Sweeney*** is reported at (1992) 71 C.C.C. (3d) 82. In the ***Johnson*** case Madam Justice Ryan noted that deterrence is to be considered in sentencing and that courts must assume that deterrent sentences have some affect. It was observed by her that deterrence operates in a general way so that those that would be encouraged to break the law must know and all law abiding citizens must be assured that law breakers will receive sentences which will reflect the seriousness of their crimes. Hopefully this will deter some potential offenders but obviously it will not deter everyone. It can simply not be the case that a case decided in 1992 could modify observations made in a case decided in 1996. In this, the learned sentencing judge obviously fell into error. But aside from this factual error, it seems to me that the learned trial judge also erred in failing to have regard to the need for courts to emphasize deterrence in this class of offence. It should be noted as well that in the case

of ***R. v. Washpan***, [1994] Y.J. No. 79 a majority of this Court noted that deterrence has long been accepted as a legitimate principle in sentencing by the Yukon Court of Appeal.

[11] The judge referred in the course of his Reasons to the case of ***R. v. Wilson***, [2003] B.C.J. No. 620, a case from the British Columbia Supreme Court where a conditional sentence had been imposed on a woman who was the administrator of a social assistance program for an Indian band. She had defrauded the band of $140,000 over a period of several years. The accused was raising her twelve year-old grandson and she was remorseful. The victim band favoured a sentence that did not involve incarceration. The accused Wilson was given a 20 month conditional sentence. Although the learned sentencing judge referred to the ***Wilson*** case, he perhaps did not fully appreciate the comment by Romilly J. at para. 43 of that judgment that "it is apparent that absent any mitigating factors the appropriate sentence for the accused would entail a period of incarceration". I observe that this case at bar is very different from the case of ***R. v. Zenovitch***, [2001] Y.J. No. 105 wherein an individual who had stolen a great deal less money than the respondent and who was highly remorseful and had a concrete plan for restitution was given a conditional sentence. Veale J. in that case, noted that a

custodial sentence would be a punishment for her young son who she was caring for and as well would prevent her from making restitution to the victim. That case presents a very different situation than the case at bar.

[12] Counsel for the respondent suggested that the sentence imposed by the judge here was an appropriate one having regard to the fact that there already had been some period spent in custody. She submitted the conditional sentence would bring home to the respondent and the community in which she served her sentence the seriousness of her conduct. It was also noted that she has been placed under a form of house arrest. Reference was made by counsel to the case of ***R. v. Bhalru***, [2003] B.C.J. No. 2695, a judgment of the British Columbia Court of Appeal rendered 28 November 2003. That case involved a Crown appeal from a conditional sentence that had been imposed on two young men who were street racing resulting in the death of a pedestrian. The British Columbia Court of Appeal upheld the sentences. The Court found that in the circumstances of these two offenders who were young and who had not been engaged in a lengthy course of bad driving, that having regard to the fact that their conduct fell perhaps in the lower spectrum of this class of offence, the sentences imposed were not unfit. The Court in that case discussed many

sentence cases including the cases of ***Johnson*** and ***Sweeney*** referred to above.

[13] It appears to me that a case like ***Bhalru*** is significantly different from the case of bar, notwithstanding the fact that there occurred the tragic outcome of the death of an individual. A significant difference lies in the circumstance that the *actus reas* there involved a very short period of dangerous driving leading to a terribly tragic consequence. By contrast, the criminal conduct in this case was planned and persistent over the course of several years. It only terminated when the thefts came to light as a result of the above-noted examination of the records of the business. Individuals who commit this class of crime, usually plan and deliberate about it to some extent. Potential offenders in this class of case will, to a greater or lesser degree, be engaged in a process of weighing the risks and benefits. That kind of consideration may be of course less likely to occur in some of the cases that were referred to by counsel wherein people who were described as "addicted gamblers" had engaged in internal or trust thefts. But leaving aside that class of case, it seems to me that people who might be inclined to take advantage of employers or clients in this sort of case are more likely to be deterred if they realize that the likely

result of such activity will be a period of incarceration. The instant case was clearly a case of breach of trust and Parliament has expressly adverted to this circumstance as an aggravating circumstance to be taken account of in sentencing.

[14] The learned sentencing judge made reference to a number of cases wherein conditional sentences have been imposed. With regard to certain of the cases from the Manitoba courts that he referred to, I infer from certain comments in one of them that it appears that the courts there may view the conditional sentencing process as a two-step process. I consider this approach to be not consistent with that adopted by other courts including the British Columbia Court of Appeal, the Alberta Court of Appeal and the Ontario Court of Appeal. Having reviewed the cases to which the learned territorial court judge referred, it appears to me that most of those cases disclose circumstances different from the case at bar.

[15] In a case like this where the sums involved are significant, the time period of the embezzlement was lengthy, there is little hope of restitution and there is found to be an absence of remorse on the part of an accused, it seems to me that generally such circumstances would militate in favour of a substantial period of incarceration. I consider that the

judge here erred in principle when he imposed a conditional sentence, having regard to the circumstances of this case. Having regard to the circumstances of the offence and this offender, it seems to me that the suggestion made at the time of sentence by the Crown that something between two and three years incarceration was called for was a proper submission. The imposition here of a conditional sentence failed to give proper effect to the need for denunciation and deterrence of this class of crime. In ***R. v. N.C.D.***, [2003] B.C.J. No. 753, a judgment of the Supreme Court of British Columbia decided in March of 2003, a sentence of three years was imposed on an individual who had stole approximately $170,000 from a hospital. In that case, Gerow J. observed that there was little chance of restitution. That circumstance is also present in this case.

[16] While I believe that a sentence in the range of two to three years would have been appropriately imposed on this respondent absent any intervening circumstances, I note that she has already been subject to a period of incarceration and there has been as well a period when she has been under house arrest. She served a month for a curfew breach in the fall. I also take account of the general upheaval to her life that all of this has undoubtedly occasioned. On the other side of

the equation of course is the circumstance that this theft caused considerable difficulty to this business and there is, as I said, virtually no chance of any restitution being made.

[17] The Crown has suggested that a sentence of 18 months ought now to be imposed on the respondent. I do not however consider that would be the correct sentence having regard to all the circumstances I set forth above. Taking into consideration the circumstances that this respondent has already spent some periods in custody and has been for a time under house arrest, I believe that the appropriate sentence for this Court to impose now is a sentence of 14 months incarceration. Although the learned territorial court judge ordered a period of probation following upon the conclusion of the conditional sentence he imposed, I would not be inclined to order any period of probation here as I do not consider that it would have any practical benefit to the respondent or victim. Since it appears to me that the chances of any restitution being made to the victim are slim indeed, I do not consider there is any utility in the Court making an order for restitution. I would allow this appeal and substitute for the sentence imposed by the territorial court judge a sentence of 14 months incarceration.

[18] **LOW, J.A.**: I agree.

[19] **LOWRY, J.A.**: I agree.

[20] **HALL, J.A.**: The appeal is allowed in the terms I have indicated.

"The Honourable Mr. Justice Hall"